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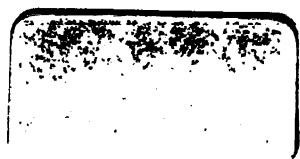
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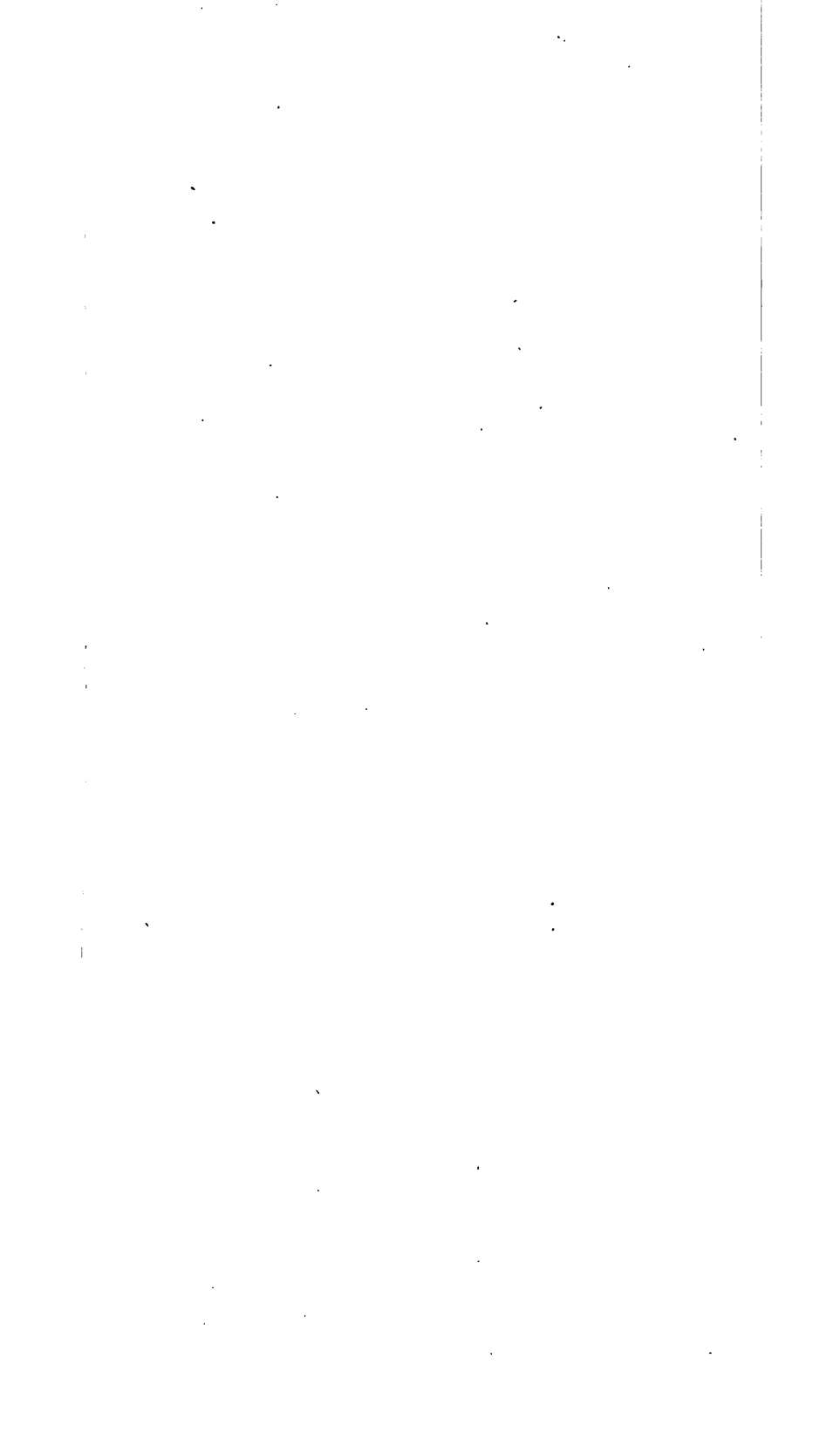
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THE
AMERICAN DECISIONS

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN

THE COURTS OF THE SEVERAL STATES

**FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1869.**

COMPILED AND ANNOTATED

BY A. C. FREEMAN,

**DOCTOR OF LAW, AND AUTHOR OF "TREATISE ON THE LAW OF JUDGMENT,"
"CO-TENANT AND PARTITION," "EXECUTIONS IN CIVIL CASES," ETC.**

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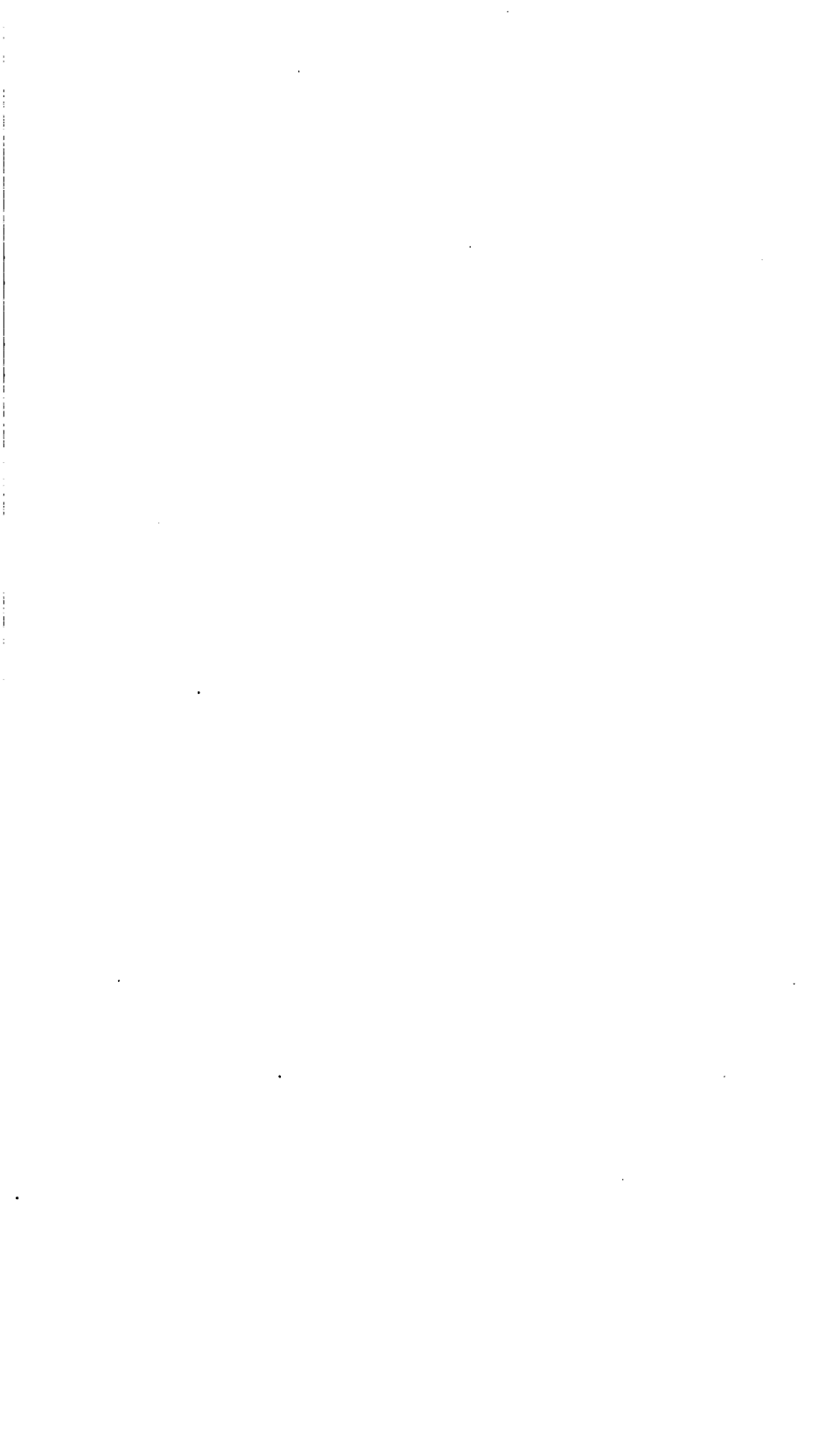
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AMERICAN DECISIONS.
VOL. XXXVI.

CASES IN EQUITY
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

POMEROY v. LAMBETH.

[1 FREDELL'S EQUITY, 65.]

IMPROVEMENTS MADE BY A TENANT AT WILL inure to the benefit of the landlord, and can not be reached by the tenant's judgment creditors.

BILL in equity, brought by the judgment creditors of one Lovick Lambeth, for the purpose of satisfying their judgment out of the improvements on certain land alleged to have been given him by the defendant, but which the evidence showed he occupied simply as tenant at will. The further facts appear in the opinion.

W. A. Graham, for the plaintiffs.

No appearance for the defendants.

DANIEL, J. (after stating the pleadings). The evidence proves that the land has been increased in value by the improvements placed on them by Lovick Lambeth. The land is now worth from one thousand two hundred and fifty dollars to one thousand five hundred dollars. But the plaintiffs have failed to prove that there was any gift, by parol or otherwise, by Joseph to Lovick; or that Joseph ever encouraged or advised Lovick to make the improvements. Lovick says in his answer, that his bankruptcy arose from losses at sea. There is no charge in the bill, that the improvements were made out of the funds of Lovick, with a view to defraud his creditors; or were subsequent to the plaintiffs' debt. If Joseph should bring his action of ejectment, there is nothing in the pleadings or evi-

dence to raise an equity in behalf of Lovick, to have compensation for these improvements. There was no gift of the land, or request by Joseph to improve; nor did Lovick make the improvements under any mistake, inadvertence, or ignorance of his title. We admit, that when a person stands by and induces another to lay out money upon his property, under a supposition that he has a right, he will be bound by the facts as he causes them to be understood: *The East India Co. v. Vincent*, 3 T. R. 462; *Stiles v. Couper*, 3 Atk. 692; *Jackson v. Calor*, 5 Ves. 688. But there is no relief upon general equity from expenditure by the tenant under the observation of the landlord, but not under any specific engagement or arrangement: *Pilling v. Armitage*, 12 Ves. 84. Lovick Lambeth was under no mistake, with regard to the nature of his title; he was but a tenant at will, or a tenant from year to year, making improvements and laying out money upon an estate in which he had no permanent interest. He may be guilty of great imprudence, but he has no equity against the landlord for such improvements: and as he has none, we are unable to see that his creditors have any.

The bill must be dismissed with costs.

By COURT. Bill dismissed.

IMPROVEMENTS PLACED UPON THE LAND OF ANOTHER become the latter's property: *Crest v. Jack*, 27 Am. Dec. 353, and note. When compensation is allowed to a *bona fide* possessor for improvements placed upon the land of another, is discussed in the notes to *Whitledge v. Wait*, 2 Id. 721; *Barlow v. Bell*, 10 Id. 731; *Jackson v. Loomis*, 15 Id. 347; *Jones v. Perry*, 30 Id. 430.

TENANT, WHEN ENTITLED TO FIXTURES as against landlord: See the prior cases in this series collected in the note to *Stockwell v. Marks*, ante, 266.

PROCTOR v. FEREBEE.

[1 IREDELL'S EQUITY, 143.]

DECREE IN EQUITY OPERATES IN PERSONAM, and can not *per se* divest the legal title.

LAND IS CONSIDERED BY EQUITY AS CONVERTED INTO PERSONALTY by a direction in a will that it shall be sold, and from the proceeds thereof a fund established for the payment of debts and legacies.

PERSONS ENTITLED TO THE PROCEEDS of the sale of land, may elect to take the land itself.

BEQUEST OF THE PROCEEDS OF THE SALE OF LAND TO A MARRIED WOMAN, inures to the benefit of her husband.

BILL in equity. Thomas P. Williams, deceased, by will directed that all his lands not given away, should be sold, and

after his debts were paid the residue divided between his wife, daughter, and son. The executor was empowered to make such sale and execute conveyances. Upon the refusal of the executor to qualify, letters of administration with the will annexed were issued to Thomas C. Ferebee, the husband of testator's daughter, who thereupon instituted proceedings which culminated in a decree and conveyance of the lands to Enoch Sawyer. Enoch afterwards conveyed to Fred. B. Sawyer, who died leaving the mother of plaintiff as his only heir at law. Plaintiff, and those under whom he claimed, had been in the continued possession of the land for over twenty years, and had materially improved the same, when Samuel W. Ferebee, the heir at law of Williams, sued him in ejectment, and recovered the premises. The further facts are stated in the opinion.

A. Moore, for the plaintiff.

Kinney, for the defendant.

RUFFIN, C. J. After the judgment of this court in the action of ejectment between these parties, at June term, 1837, the lessor of the plaintiff went into possession of the premises recovered. Proctor, the defendant at law, then filed this bill against Ferebee, and therein states the will of Thomas P. Williams, and all the other matters touching the titles of the respective parties to the land in controversy in that action, in substance as the same appear in the report of the suit at law, in 2 Dev. & Bat. 439.¹ But the bill further states that Thomas C. Ferebee, the administrator of Thomas P. Williams, and husband of Peggy Williams (heir of Thomas P. Williams), and father of the present defendant, received the price bid for the land, and carried the same into his account as administrator, and applied the same, in part, to the payment of the testator's debts; and paid over two thirds of the residue thereof to the testator's widow and to his son Samuel, as their shares, under the bequests in the will, and retained the other third part as the share of his wife Peggy, under the same bequest. The prayer is, that the defendant may be decreed to restore the possession, convey the legal title, and account for the rents and profits. The answer admits all those facts as set forth in the bill. But it insists that the recovery at law was effected, upon the ground that Mrs. Ferebee was not a party to the suit brought by Thomas C. Ferebee, her husband, and administrator of Thomas P. Williams, deceased, for the sale of the land; and for the same rea-

1. *Ferebee v. Proctor*.

son that the present defendant, who claims as her heir, can not, in this court, be bound by the decree therein, or anything done under it.

We must remark that the defendant is mistaken as to the ground of the recovery at law. The court expressly declined questioning the operation of the decree, on the interest of Mrs. Ferebee, merely on the ground that she was not a party to the suit. It was so declined, because, if she had been a party, the decree could not have affected her legal title, for the reason that a decree in equity does not profess, and can not, *per se*, divest a title at law, but only obliges a person who has the title, and who is mentioned in the decree, to convey as therein directed. In that case, Thomas C. Ferebee was decreed to convey. But as the title was in the testator's heirs, and not in him, his conveyance passed nothing; and the title remained, as before, in the heirs of the testator. That was the reason why the judgment in ejectment was given; for as the present defendant's mother had not conveyed, he was, upon the death of his father, entitled in possession to an undivided moiety of the land. Whether in this court the defendant can retain the benefit of that judgment, depends on different principles. Upon the admitted facts, we think it clear he can not.

Upon the construction of the will, we before expressed the opinion that a sale of the land was not only to be made in case it became necessary, in aid of the personal estate, for the payment of debts, but that the intention was positive that there should be a sale at all events, either to create a fund for the payment of debts in room of a part of the personal estate, or for a division between the wife, daughter, and son. We now see no reason to doubt the correctness of that opinion, but think it sufficiently established by the reasons then stated. Consequently, in this court the fund is considered as converted, out and out, into personalty, because the testator intended that it should be so converted.

In this aspect of the case, then, the defendant's mother had the legal estate, upon an express trust to turn the land into money, and pay the proceeds into the hands of the personal representative of the testator, to be by him applied, first, to the payment of his debts, and then, secondly, to be divided among three persons, of whom she was herself one. Now, admitting that it is competent for persons thus entitled to the proceeds of the sale of land, to elect to take the land itself, or that only so much shall be sold as will satisfy the debts, yet nothing of that

kind occurred here. On the contrary, the parties agree that a sale was necessary for the payment of debts, and part of the proceeds of the land was so applied. Indeed, two of the three legatees, Mrs. Williams and Samuel Williams, expressly elected that there should be a sale of the land, and in their answer, in the suit in equity, joined in the prayer for it. But here the defendant objects that his mother was not a party to that suit, and therefore, her share is not bound by the proceedings. If she had been a party, the decree would indeed have concluded her, as it does those who were parties *proprio vigore*, without regard to the truth of the facts stated in the pleadings, or declared in the decree. But in this case it is not material that Mrs. Ferebee should have been a party to that suit; nor is it necessary to recur to that proceeding, even to bind Mrs. Williams, or Samuel Williams, or for any other purpose in this cause. It may be dismissed from our consideration altogether, and there will yet remain enough to compel the relief to the plaintiff. It is admitted that the widow and son received their shares of the proceeds of the sale. They therefore must be regarded as concurring in or confirming the sale by that act, independent of the decree. Then as to the share of Mrs. Ferebee, it is to be recollected that, in the view of this court, that is personalty, and, by consequence, at the disposition of the husband. The wife could make no election to the prejudice of the husband. On the contrary, the husband, having received the purchase money, and paid to other persons such parts as they were entitled to, kept his wife's share as a personal legacy, belonging in law to himself, as in truth it did.

Thus the case is that of a sale of land by the *cestuis que trust*, who are here looked upon as the owners, and the receipt of the purchase money by them, upon the strength of which the purchaser calls on the trustee for the legal title. Of course nothing remains but for the trustee to convey, as asked. The plaintiff is therefore entitled to be restored to the possession; and there must be the usual decree for a conveyance, to be approved by the master, and for an account of the rents and profits, and of the costs adjudged to the present defendant as lessor of the plaintiff in the suit at law; and the defendant must pay the costs of this suit.

By COURT. Decree for the plaintiff accordingly.

TITLE, WHEN DIVESTED BY JUDGMENT OR DECREE PER SE.—The doctrine of the principal case, that a title can not be divested *per se* by a decree in equity, has long been established and acted upon by courts of chancery,

and forms one of the most distinguishing remedial features of the equitable system as it prevails in this country and in England, except as modified by statutory enactments. The early English chancellors, in the development of the notion that equity acts on and affects merely the consciences of those against whom its aid is sought in the enforcement or protection of rights, laid down the maxim, that equity acts *in personam* against the parties, and not *in rem* upon the subject-matter, or, as it was expressed in the legal nomenclature of the day, *aequitas agit in personam*: Story's Eq. Jur., secs. 743, 744; Pomeroy's Eq. Jur., secs. 134, 135, 170, 428-431; *Penn v. Lord Baltimore*, 1 Ves. 442; 2 Eq. Lead. Cas. 923, and cases cited in the notes thereto. The effect of this maxim was most important and far reaching. It prevented a decree *ex proprio vigore* from creating or divesting any estate or interest in the subject-matter of the controversy, and limited it to a personal command upon the party who was ordered to do or refrain from doing that particular act which it was the object of the suit to secure. Thus, if the purpose of the litigation was to procure the specific enforcement of a contract for the conveyance of land, or for a partition of the same, or that an instrument should be surrendered up and canceled, and the like, the decree determining the rights of the plaintiff to the relief prayed for, never operated to invest him with the legal title. It simply empowered him to proceed further, and by the exercise of the remedial processes of the court of chancery, such as sequestration, or imprisonment for contempt, to compel the defendant to execute the conveyance, or surrender the instrument, or do any other final act necessary to be done by him to transfer the legal title to the plaintiff.

Important as was this doctrine in the earlier stages of the development of the equity jurisprudence, its operation has been greatly modified, and in most cases affecting the title to lands, entirely abrogated by statutes which have been passed in England and the United States. These statutes may be divided into two classes: 1. Those which provide in very general language, that if the decree direct a conveyance, release, or acquittance to be made, and the party against whom the decree is rendered fails or refuses to execute the same in the time specified in the decree, or in a reasonable time, if no particular time is specified, the decree operates in all respects as if the conveyance, release, or acquittance were made; and 2. Those statutes which provide, that upon the failure of the defendant to perform the acts required to be done to pass the legal title, the same shall be done by an officer of the court, acting for him and in his name, and which give to such acts the same effect as if done by the party against whom the decree was rendered. Statutes falling within the first class, have been enacted in the states represented by the following decisions, in which it has been held that a decree *ipso facto* passes the legal title, and no further act on the part of any one is required to be done: *King v. Bell*, 23 Conn. 598; *Battle v. Bering*, 7 Yerg. 529; *Taylor v. Boyd*, 3 Ohio, 337; S. C., 17 Am. Dec. 603; *Randall v. Pryor*, 4 Id. 424; *Penn v. Hayward*, 14 Ohio St. 302; *Griffith v. Phillips*, 3 Grant's Cas. 381; *Young v. Frost*, 1 Md. 403; *Price v. Sisson*, 13 N. J. Eq. 168; *Gitt v. Watson*, 18 Mo. 274, and in all subsequent cases such decree should be construed by the same rules as ordinary conveyances: *Hoffman v. Stigens*, 28 Iowa, 302. But if the exigencies of the case require a conveyance, the same will be ordered: *Young v. Frost*, 1 Md. 403; and may be enforced by proceedings for contempt: *Randall v. Pryor*, 4 Ohio, 424; in which case, if there is a variance between the terms of the decree and of the conveyance, the rights of the parties will depend upon the former rather than the latter: *Price v. Sisson*, 13 N. J. Eq. 168. And upon the same principle, where the decree operates as a conveyance, a reversal of the same, as between the parties, divests the title, and

reverts it in the person who held it before the decree was made. But if a conveyance is made under such decree, in good faith, before the proceedings to reverse the decree are commenced, the title of the purchaser will not be affected by such reversal: *Taylor v. Boyd*, 3 Ohio, 337. When the title is divested, is a question which has occasioned a conflict of opinion. In *Shotwell v. Isaacson*, 30 Miss. 27, it was held that the title under the decree related back to the commencement of the suit; while in *King v. Bell*, 28 Conn. 598, it was decided that the title did not pass until the date of the decree. The operation of these statutes, however, is confined to cases brought in the state courts. If the decree is rendered in a court of the United States, although it affects property situated within the state where the statute is in force, the decree will not operate as a conveyance, and actual execution of a deed must be enforced either by attachment or sequestration: *Shepherd v. Ross Co.*, 7 Ohio, 271. In order that such a decree shall operate as a conveyance, the land must be within the jurisdiction of the court. If the land which is the subject-matter of the controversy or of the decree, is within a foreign jurisdiction, the decree can not operate as a conveyance. It must be enforced by attachment, or otherwise, as the case may require. And it makes no difference that at the time the decree was rendered the land had been brought within the jurisdiction of the court, if at the institution of the suit it was without: *Daniel v. Stevens*, 19 Ohio, 222; *Penn v. Hayward*, 14 Ohio St. 302. The power of the court to act in *personam* has not been abrogated by the legislation referred to above. It may still enforce its decrees in such manner, as, for example, where the subject-matter of the controversy is situated in a foreign country, and the parties to be affected are subject to the jurisdiction of the court: *Pomeroy's Eq. Jur.*, sec. 135; *Daniell's Ch. Pr.* 1032; *Penn v. Lord Baltimore*, 1 Ves. 444; 2 Eq. Lead. Cas. 932, and notes thereto; *Carrington v. Brents*, 1 McLean, 167; *Watts v. Waddle*, Id. 200; *Willis v. Couper*, 2 Ohio, 124; *Henry v. Doctor*, 9 Id. 49; *Olney v. Eaton*, 66 Mo. 563; *Caldwell v. Carrington*, 9 Pet. 86; *Brown v. Desmond*, 100 Mass. 267; *Pingree v. Coffin*, 12 Gray, 304; *Davis v. Parker*, 14 Allen, 94; *Mead v. Merriitt*, 2 Paige, 402; *Hawley v. James*, 7 Id. 213; *Sutphen v. Fowler*, 9 Id. 280; *Newton v. Bronson*, 13 N. Y. 587; *Bailey v. Ryder*, 10 Id. 363; *Gardner v. Ogden*, 22 Id. 332.

In other of the states, which have enacted no such general statutes as those referred to above, the same effect has been produced by virtue of the statutory provisions regulating certain proceedings. The most important of these special statutes which have been passed in England and in the various states of the American union are those regulating the partition of lands between joint owners or owners in common. These statutes differ so greatly in their details, that no attempt will be made here to classify them. They may be found collected in 1 Washburn on Real Prop. 689, n., 4th ed. They all provide for the appointment of a commission to examine the premises, make a preliminary partition of the same, and report their action to the court. The court may then affirm the report of the commissioners, or otherwise, as the nature of the case demands. Upon an affirmance of the report the question has frequently arisen, what effect has such decree upon the legal title to the various allotments. Most of the courts which have passed upon this question have held that the decree operated as a conveyance, and that no deeds of mutual release or partition were necessary to transfer the legal title: *Wright v. Marsh*, 29 Greenl. 94; *Barney v. Chittenden*, Id. 165; *Dixon v. Wartens*, 8 Jones' L. 451; *Griffith v. Phillips*, 3 Grant's Cas. 381; *Allie v. Schmitz*, 17 Wis. 160; *Cannon v. Hemphill*, 7 Tex. 202; *Street v. McCannell*, 16 Ill. 125; *Van Orman v. Phelps*, 9 Barb. 500; *Young v. Cooper*, 3 Johns. Ch. 296; but see *Smith v. Moore*, 6 Dana, 417, where conveyances were required. Such

title, it has been held, passes from the date of the commissioners' report, so as to enable a party acquiring the title to maintain trover for a conversion between the date of such report and the date of the decree: *Dixon v. Warters*, 8 Jones' L. 451. In New Hampshire, a decree in a divorce suit, assigning to the wife a part of her husband's estate, has been regarded, in the case of real property, as divesting the right of the husband, and vesting the entire interest and right in the wife, by the mere force of the decree, as effectually as the same could be done by any conveyance from the husband himself. The court said, however: "Where the husband is ordered by a decree to pay a sum of money to the wife, the effect of the decree is not to change the title of any specific property, nor to give the wife any interest therein, and the order of the court is to be enforced, like any other executory order of the court, by process of execution, or of contempt, as the case may require. * * * But the case is otherwise where the wife's property is restored, or some of the husband's property is assigned to her. Such decree is not executory; it is at once, by force of law, fully executed. The property passes by force of the decree:" *Whittier v. Whittier*, 31 N. H. 452. And the same point was decided in *Swett v. Swett*, 49 Id. 284.

The effect on passing the title by the recovery of a judgment in an action of trover for the value of the articles converted is fully discussed in the note to *Woolley v. Carter*, 11 Am. Dec. 520.

KING v. KINCEY.

[1 IREDELL'S EQUITY, 187.]

MORTGAGE—CONVEYANCE OF LAND, ACCOMPANIED BY VERBAL AGREEMENT TO RESELL the same at a certain date to the grantor or his appointee, upon repayment of the consideration therefor, constitutes a sale and not a mortgage.

BILL of redemption. The opinion states the facts.

No appearance for the plaintiff.

J. H. Bryan, for the defendant.

DANIEL, J. The plaintiff filed this bill on the twenty-ninth of November, 1833, to enjoin the defendant from proceeding in an action of ejectment against him, and also to redeem what he alleges to be a mortgage of the land to the defendant. The plaintiff alleges that he, being distressed for money to pay his debts, agreed to mortgage to the defendant the land, two hundred and twenty acres, worth three thousand dollars, for the sum of one thousand three hundred dollars; that being an illiterate man, it was agreed between them that the defendant should have the mortgage deed prepared; that instead of a mortgage deed, he had prepared an absolute deed of bargain and sale with a covenant of warranty. The plaintiff proceeds to state, that he, being much distressed with his debts, and hav-

ing no other person to aid him but the defendant, and then having great confidence in his word, did, on the twenty-fifth of September, 1829, execute the said deed, under a parol agreement, made at the time, that he might redeem the land in two years; that on the twenty-fifth of November, 1833, he tendered to the defendant all the money due to him on the said mortgage, but he refused to accept it, or to reconvey the land, and brought a suit at law to oust the plaintiff of his possession.

The defendant, in his answer, says that the plaintiff offered to mortgage the land to him for a loan of money; but he expressly and distinctly refused to make any such agreement, but told the plaintiff that he would purchase the land absolutely. Whereupon an agreement for the absolute sale was entered into between them, and they both went to a mutual friend to have the deed prepared, which was accordingly done, and the deed was distinctly read over to the plaintiff, and he executed the same, well understanding its purport. The defendant admits that he did agree with the plaintiff to resell the land to him in two years, for the same sum of money, with interest; or to convey it to his appointee, if such appointee would give a larger sum. But he denies that the deed by him taken, was ever intended to be a mortgage to secure any debt or demand which the defendant had on the plaintiff. The defendant says that the price by him paid for the land (one thousand three hundred dollars) was a full and fair price for the same; that he afterwards leased the said land to the plaintiff for two successive years, expecting that he might avail himself of the agreement for a resale; that the plaintiff, failing to comply with the agreement to repurchase within the time limited, he, at the expiration of the two years, occupied and cultivated himself all the land, except the dwelling-house and some lots of land near it, which he, out of humanity, let the plaintiff occupy, as he had then no other place to move to. Since he took possession of the land, he, the defendant, has made large improvements in clearing, ditching, and fencing. The defendant denies that the plaintiff is illiterate; he denies any circumvention or undue advantage taken of the plaintiff to obtain the said absolute deed of bargain and sale. To this answer a replication was put in by the plaintiff.

There has been a great deal of testimony taken in this cause; many witnesses have been examined, and, among the rest, Emanuel Jarman, who wrote the deed. He says that King and Kin-
cey came to his house, and both parties requested him to write

a warranty deed for the land, which he did. King said he had sold his land to Kincey. Kincey said, at the time of receiving the deed, that if King would refund the sum given for the land, within two years from that time, he would return the land in a quitclaim deed. Witness understood this to be a part of the contract. F. H. Jarman, the subscribing witness, states that King then, and at that time, said he had sold the land to Kincey; asked his father to write the deed; it was done; they executed it, and he witnessed it. Kincey then stated that he had bought the land to save himself, and, when King paid him his money and interest, he would give the land up to him again. Several of the witnesses depose that King told them that he had sold the land to Kincey, but that he had two years to get it back, by paying the same money, or selling it to any other person at a higher price than Kincey had given for it. There is proof that King knew how to write and read writing. He knew what he was doing when he executed the deed. There is no proof that Kincey circumvented him, or imposed on the weakness of his understanding, to get him to execute an absolute deed, when he intended a mortgage. As to the value of the land there has been a number of witnesses examined. Of those on the part of the plaintiff, some say it was worth one thousand three hundred dollars—one says it was worth two thousand dollars. Of those on the part of the defendant, three say it was worth only one thousand dollars—several say (and they are good farmers, and men of standing in the neighborhood) that the price given, one thousand three hundred dollars, was a full and fair price for the fee simple in the said land. Upon the whole case therefore, we are of the opinion that a mortgage was not intended by the parties, at the time of the execution of the deed; but that the defendant agreed by parol to resell to the plaintiff or to his appointee, in two years from the date of the deed, for the same sum to the plaintiff, or to his appointee, if he would give a larger sum. From all the testimony, we think one thousand three hundred dollars was a fair and full price for the land at the date of the deed. There is nothing in the evidence to show that the parties contemplated a mortgage. There is nothing to show that the plaintiff was taken in or oppressed by the defendant. The plaintiff did not make application to repurchase the land in the time agreed upon, and he now has no right to complain. The bill must be dismissed with costs.

By Court. Decree accordingly.

ABSOLUTE DEED, WHEN CONSIDERED A MORTGAGE: See *Washburn v. Merrill*, 2 Am. Dec. 59; *Erskine v. Townsend*, 3 Id. 71; *Wilcox v. Morris*, Id. 678; *Dabney v. Green*, 4 Id. 503; *Dunham v. Dey*, 8 Id. 282; *Chase's case*, 17 Id. 277, and note; *Reading v. Weston*, 18 Id. 89; *Edrington v. Harper*, 20 Id. 145; *Harbison v. Leman*, 23 Id. 376; *Youle v. Richards*, Id. 722; *Gillis v. Martin*, 25 Id. 729; *Colwell v. Woods*, 27 Id. 345.

THE PRINCIPAL CASE IS CITED in *Elliott v. Maxwell*, 7 Ired. Eq. 249, to the point that an absolute deed will not be construed to be a mortgage without clear and convincing proof.

BROWN v. LONG.

[1 IREDELL'S EQUITY, 190.]

CREDITORS MUST ESTABLISH THEIR DEBT AT LAW before they can claim equitable relief.

EXECUTION ISSUED ON A DORMANT JUDGMENT IS IRREGULAR, but not void, and can be set aside.

JUDGMENT CREDITORS MUST EXHAUST THEIR LEGAL REMEDIES by execution before they can obtain the interposition of equity, unless their debtor is insolvent, or has no visible property.

BILL in equity. The opinion states the facts.

Iredell, for the plaintiffs.

J. H. Bryan and Boyden, for the defendants.

RUFFIN, C. J. It appears upon the pleadings, that the plaintiff Brown gave to the plaintiff Campbell, his bond with surety for the amount of the debt of Long, one of the defendants, to Campbell, for which Brown was Long's surety; and that thereupon Campbell assigned the judgment at law to the plaintiff Cowan, in trust for Brown. It is admitted, by the defendants who have answered, that Josiah Huie and Robert Huie were respectively indebted to Long by bonds in the sums mentioned in the bill, and that he, Long, indorsed the bonds to the defendants Hardie and Hargrove, in trust for himself, and to enable them to collect the debts for his benefit. It is also admitted by them that the defendant Long has no visible or tangible property. But Long states in his answer, and such is the fact, that, at the filing of the bill, both the judgment obtained by Campbell and that obtained by Brown against Long, were dormant; and although, pending this suit, the latter has been revived, Campbell's judgment is still dormant; and for these reasons, he insists that there can be no relief here in respect to either of the judgments. An order was made by consent, in the court of equity of Rowan county, that the master

of that court should collect the moneys due on the bonds of the Huies, and hold the same subject to the decree of the court; and the cause was set for hearing and sent to this court.

But a single question arises in the present state of this case; which is, whether the plaintiffs are precluded from the relief to which they would otherwise be entitled, because the judgments at law were dormant, when the bill was filed, and one of them is yet so? Upon the consideration of it, our opinion is against the objection made by the defendants. We agree that the creditor must show himself to be so by judgment; for it is only after he has established his debt at law, that he can claim the interposition of this court to aid him either by making his execution at law effectual, or by giving him relief by decree in this court, in the nature of an execution: *Rambaut et al. v. Mayfield et al.*, 1 Hawks, 85. But here the debts have been reduced to judgments, and thus their justice conclusively established. It is true no execution could regularly issue on them, while dormant. But even then there is not such a presumption of satisfaction as to render an execution, if issued, void. It is only irregular, and may be set aside at the instance of the party: *Oxley v. Miale*, 3 Murph. 250; *Dawson v. Shepherd*, 4 Dev. 497. Much less can it be assumed, in this suit, that the judgments are satisfied, or that the whole debts do not remain justly due, when the debtor himself, after admitting the original debts and judgments, does not pretend, in his answer, that he has ever paid one cent upon either. The arrangement between Campbell and Brown does not amount to payment; for to avoid any possible inference of the sort, an assignment is taken to a third person, which has been held sufficient to keep the security on foot: *Hodges v. Armstrong*, 3 Id. 253; *Sherwood v. Collier*, 3 Id. 380 [24 Am. Dec. 264].

Then with regard to issuing an execution on a judgment, before coming into this court, we agree likewise that it is generally proper and necessary, and that for several reasons. Where the object of coming into a court of equity is, to ascertain incumbrances, to set aside conveyances as fraudulent, or otherwise clear the title of property, which the creditor alleges is liable to be sold under execution at law, the suing out of an execution, before filing the bill, is indispensable, to create a specific lien on the particular property in respect to which relief is sought. But if the property, out of which the satisfaction is sought, be an equitable right merely or any other right, which can not be reached by a legal execution, it is vain to issue the execution, so

far as respects the creation of a lien; for, if issued, it could have no such effect. It is, however, ordinarily proper, even in such a case as the last, to take out an execution; but for a different purpose, namely, to establish, by demanding property from the debtor and a return of *nulla bona*, that satisfaction can not be had at law out of any other effects of the debtor; and, for that reason, that the creditor was compelled to come into a court of equity, for satisfaction out of such of the debtor's effects as that court only can reach. A court of equity never interposes in behalf of a mere legal demand, until the creditor has tried the legal remedies and found them ineffectual. Then, and not before, this court lends its extraordinary aid: *McKay v. Williams*, 1 Dev. & Bat. Eq. 398; *Rambaut et al. v. Mayfield et al.*, 1 Hawks, 85. But, in the present case, the necessity for the action of this court sufficiently appears, without resorting to further executions at law. The debtor was once taken in execution, and obtained his discharge as an insolvent; and he now admits that, when this bill was filed, and when he answered, he had nothing tangible, nor any effects but these equitable demands, due on notes assigned by himself, and held in trust for him. What useful purpose could a further execution answer in such a case? None whatever. It could create no lien, nor could it establish as clearly as it is established by the answers, that the creditor could not obtain satisfaction at law, or by means of any execution but such as this court can supply.

We therefore think the defense must fail; and declare the plaintiff Brown entitled to satisfaction of the principal money, and interest, and the costs due on the two judgments, out of the moneys arising from the bonds of the Huies; and it must be referred to the master to inquire and report the sums due in respect thereof; and also, the master of the court of equity for Rowan county must be directed to pay into this court the moneys arising from the said bonds of Josiah Huie and Robert Huie, as he may collect the same, to be applied as far as necessary to the satisfaction of the plaintiff's said demands and the costs of this suit.

By COURT. Decree accordingly.

JURISDICTION OF EQUITY TO ENFORCE CREDITORS' DEMAND: See *Corning v. White*, 22 Am. Dec. 659; *New London Bank v. Lee*, 27 Id. 713; *Edmeston v. Lytle*, 19 Id. 454. When a creditor may maintain a bill in equity, to enforce his judgment, see *Birely's Ex'rs v. Staley*, 25 Id. 303, and note.

THE PRINCIPAL CASE IS CITED and approved in *Frost v. Reynolds*, 4 Ired. Eq. 494; *Kilpatrick v. Means*, 5 Id. 220; *Powell v. Watson*, 6 Id. 94; *Bridges*

v. *Moye*, Busb. Eq. 170; *Britain v. Quiett*, 1 Jones' Eq. 323, to the point that creditors must establish their debt at law before coming into equity; and in *Murphrey v. Wood*, 2 Id. 63, to the point that an execution issued on a dormant judgment is irregular, but not void.

QUINN v. GREEN.

[1 IDELL'S EQUITY, 229.]

BILL OF INTERPLEADER, TO DETERMINE THE OWNERSHIP OF PROPERTY taken under execution, can not be maintained by a sheriff, against those ordering the execution, and persons asserting a hostile interest in the property seized.

BILL OF INTERPLEADER MUST ADMIT A TITLE AGAINST THE PLAINTIFF in all of the defendants. Such bill, which states that as to some of the defendants plaintiff is a wrong-doer, can not be sustained.

BILL in equity. The opinion states the facts.

Saunders, Alexander, and Hoke, for the plaintiff.

Boyd, for the defendant.

RUFFIN, C. J. The plaintiff, being sheriff of Lincoln county, received a writ of *feri facias* for two thousand four hundred and ninety-eight dollars and twenty-three cents, with interest and costs, recovered by the defendant Green against the defendant Johnson, as administrator of Timothy Chandler, deceased. The plaintiff placed the execution in the hands of one Maury, one of his deputies, who seized under it two slaves, which were found in the possession of the defendant Morris; and also six other slaves, and some cattle and household furniture, which were found in the possession of the defendant Elizabeth Chandler. The seizure was made by the direction of the creditor Green, who pointed out the slaves and other articles to the deputy sheriff, as property belonging to the estate of Timothy Chandler, derived from Elizabeth Chandler by their intermarriage and his subsequent possession. Morris, alleging the two slaves, that were taken out of his possession, to belong to him under an appointment by Elizabeth Chandler under a power in the will of one Arthur Graham, a former husband of the said Elizabeth, instituted an action of detinue for those slaves against Maury and Green. James Graham, as administrator of one William Graham, deceased (who was a son of the said Arthur Graham, deceased), also claimed the other six slaves, under a provision in the will of the father, Arthur; and brought an action of detinue for them against the same persons. A third

action, namely, trespass, was brought against the same parties, Maury and Green, by Elizabeth Chandler, who claimed property in part of the slaves and other articles and the right of possession of the whole, and denied that any part was of the estate of her last husband, Timothy Chandler. The deputy sheriff delivered all the effects seized to his principal, the present plaintiff; and he was required by the creditor, Green, to proceed to a sale, and also by Johnson, the administrator of Timothy Chandler, who insisted that the slaves and other things did belong to the estate of his intestate. The sheriff then filed this bill, as a bill of interpleader, against Green, Johnson, administrator of T. Chandler, and against the plaintiffs in the three actions at law, that is to say, Morris, James Graham, administrator of William Graham, and Elizabeth Chandler; in which he acknowledges the possession in himself of all the property seized by his deputy, and submits to deliver to either or any of the defendants, or otherwise to dispose of it as of right he ought; and, in the mean while, prays for an injunction against further proceedings in the suits already brought at law, and also to restrain the creditor, Green, from taking any steps at law to compel him to sell, or amerce, or otherwise punish him for not selling.

To this bill the defendants Green and Johnson, administrator, demurred; and the other defendants put in answers, setting forth the nature of their respective claims, and submitting to interplead with the other parties. But when the cause came on to be argued on the demurrer, between the plaintiff and the two defendants, who had put it in, the judge of the court of equity was of opinion, that the case was not a fit one for a bill of interpleader, and therefore sustained the demurrer and dismissed the bill as against those two parties. From that decree the plaintiff appealed to this court.

In support of the bill, the counsel for the plaintiff has been unable to adduce the authority of any adjudication. His only reliance is a dictum of Lord Mansfield, in *Cooper v. Sheriff of London*, 1 Burr. 37; in which he mentions a bill filed in chancery by the sheriff, in a case of disputed property, as one of the modes in which a sheriff may be relieved from danger or indemnified from loss. That, however, could not be a question in that cause; and, indeed, the doctrine belonged to another jurisdiction, and therefore, although laid down by an eminent judge, is not authority. We are saved the necessity of discussing the question on elementary principles, by having a case in equity deciding it in opposition to that opinion of Lord Mans-

field. *Slingsby v. Boulton*, 1 Ves. & Bea. 334, was a bill of interpleader by a sheriff, similar to the present; and, on the motion for an injunction, Lord Eldon inquired for an instance of such a bill by a sheriff, and, none being cited, he declared the sheriff to be concluded from stating a case of interpleader, because in such a bill the plaintiff always admits a title against himself in all the defendants. He said, a person can not file such a bill, who is obliged to state, that as to some of the defendants the plaintiff is a wrong-doer.

If, in this case, the property was in the plaintiffs in the actions that have been brought at law, the sheriff was a trespasser in seizing it, and he did it upon the responsibility of answering for the act as a trespass. Against that risk he should have provided, by taking a bond of indemnity from the execution creditor. He can not escape from responsibility by turning over the owners of the property on the creditor. On the other hand, if the property was really subject to the debt, it was properly seized, and the creditor is entitled to have it sold, notwithstanding unfounded actions or claims by third persons. The sheriff, having thus made himself liable to one or other of the parties, by misfeasance or non-feasance, is not a mere stakeholder, but his interest is directly involved in any decision that can be made on the claims of the other parties. The decree must therefore stand affirmed and with costs in both courts.

By COURT. Decree accordingly.

THE PRINCIPAL CASE IS CITED in *Queen v. Patton*, 2 Ired. Eq. 48, to the point that a sheriff who has seized property can not compel adverse claimants of the same to interplead for the purpose of deciding the question of title. For note on the subject of interpleader, see *Shaw v. Coster*, 35 Am. Dec. 960.

FOX v. HORAH.

[1 IREDELL'S EQUITY, 352.]

CORPORATION'S RIGHT TO ENJOY PROPERTY LASTS only so long as the corporation exists.

UPON THE DISSOLUTION OF A CORPORATION BY LAPSE OF TIME, at common law its real estate reverted to its grantors and their heirs, its personal property escheated to the state, and its debts and credits became extinct. PROMISSORY NOTE, EXECUTED IN FAVOR OF A BANK'S CASHIER, in trust for the use and benefit of the bank, is extinguished by the termination of the bank's corporate existence by lapse of time.

BILL in equity. The opinion states the facts.

Alexander, Saunders, and Boyden, for the plaintiff.

D. F. Caldwell and W. H. Haywood, jun., for the defendant.

GASTON, J. A loan of money was obtained by one John G. Hoskins from the late state bank of North Carolina, by the discount at the Salisbury branch of said bank, of a note executed by said Hoskins as principal and Stephen Fox and William W. Long as sureties; payable at said branch to William H. Horah, cashier thereof. Upon this note an action at law was brought by Horah in the county court of Mecklenburg against Hoskins, Fox, and Long, which action was by successive appeals of the defendants carried up to the superior court of that county, and thence to this court, and a judgment was ultimately obtained by the plaintiff, after a deduction of sundry payments, for a balance of four hundred and sixty-eight dollars and nineteen cents, with interest on three hundred and eighty-five dollars and sixty-two cents, part thereof, from the February term, 1839, of Mecklenburg superior court. Pending this action in the superior court the charter of the bank expired by its original limitation, and an attempt was there made to set up this occurrence as a legal defense; but the defense failed, because, in the language of this court, "the legal interest in the debt was in Horah, and the action properly brought by him, and whether he was a trustee for the bank or any other person was an inquiry with which a court of law had no concern:" *Horah v. Long*, 4 Dev. & Bat. 274 [34 Am. Dec. 378]. Therefore Fox, the present plaintiff, filed this bill against Horah, in which, after setting forth the death and insolvency of Hoskins and also the insolvency of Long, and charging certain payments or equitable payments to have been made to the bank and its attorneys in full discharge of the debt, he insisted that the debt for which Horah had obtained a judgment, was due to the bank, that its charter had expired, that thereby the said debt, if any part thereof remained unpaid, was extinguished; that Horah was not entitled beneficially to the same or any part thereof; and that it is unconscientious in him to collect it for his own benefit, and praying for an injunction. Upon the filing of the bill an injunction was granted pursuant to the prayer. The defendant put in an answer, wherein he denied the payments alleged to have been made, and admitted the expiration of the charter as charged, and insisted that he, being the legal owner of the judgment, had a right, notwithstanding such expiration of the charter, to collect the same, and declared his purpose, when it

should be collected, to apply the proceeds to the satisfaction of outstanding demands against the late corporation and the stockholders thereof. Upon the coming in of this answer the defendant moved for a dissolution of the injunction with costs. The court so decreed, and from this decree the plaintiff prayed and obtained an appeal to this court.

One at least of the questions arising upon this appeal is not free from difficulty, and, so far as we can learn, is now for the first time presented for judicial decision. Certain it is that neither our own researches nor those of the counsel have furnished any adjudications, which have a direct bearing upon it. To enable us, therefore, to come to a just conclusion, we must go back to principles in some degree elementary to endeavor to ascertain them with precision, and apply them, when ascertained, to the case before us. The late state bank was formed by an association of individuals, under authority of acts of the legislature, by which they were constituted a body corporate and politic to continue until the first day of January, 1835. Though the several acts, by which the institution was created or its powers, duties, and duration declared were public acts, the corporation itself was a private corporation: *State Bank v. Clark*, 1 Hawks, 36. As such it was an artificial person existing only in contemplation of law, and having those capacities, which its charter conferred upon it, either expressly or as incidental to its existence. Among these was the capacity to hold property of the description mentioned in its charter, as an individual, continuing its existence and preserving its identity, notwithstanding all the changes by death or otherwise, among the natural persons, of whom that body politic was formed. This capacity—and others by which a corporation is enabled to maintain its personality and identity—are sometimes spoken of as constituting a kind of “legal immortality.” It is certain, however, that the capacity to enjoy property in succession exists only so long as the corporation exists—that if by its charter the duration of the corporation be limited, and if that duration be not extended by the sovereign authority, the corporation dies when the allotted term of its existence has run out—and that, before the expiration of this term, the corporation may lose its existence by forfeiture of charter, because of ascertained delinquency, or by a dissolution of the connection, by which its members had been compacted into one artificial person. We believe that the rules of the common law, governing the disposition of the property which the corporation held, at the moment of

death are well settled—though differing according to the character of the property upon which they operate as being either realty, personalty, or choses in action. The real estate remaining unsold reverts to the grantor and his heirs, “because (in the language of Lord Coke) in the case of a body politic or incorporate the fee is vested in their political or incorporate capacity, created by the policy of man, and therefore the law doth annex a condition in law to every such gift and grant that if such body politic or incorporate be dissolved, the donor or grantor shall re-enter, for that the cause of the gift or grant faileth:” Co. Lit. 136.

Goods and chattels, by the common law, were deemed of too transitory and fluctuating a nature to be susceptible of reverſionary interests after an estate for life, and, on the death of a corporation, they do not revert to the grantor or donor, but, being *bona vacantia* or goods wanting an owner, they vest in the sovereign, as well to preserve the peace of the public, as in trust to be employed for the safety and ornament of the commonwealth. Choses in action are under the operation of a different rule. They were rights of the corporation to demand money in the hands of persons, by whom it was withheld. They derived their existence from contracts or *quasi* contracts—by which the relation of debtor and creditor was created. When the creditor corporation died, and there was no successor, no representative, the relation of debtor and creditor ceased, and the debt became necessarily extinct. None but the creditor had a right to demand the money, and when his right is gone, the money becomes to all purposes the money of the possessor. These rules of the common law, except as far as they have been modified by the acts of our legislature, and excepting also those cases, in which by the charters of incorporation, special provision is made in regard to the corporate property, are the law here.

Very important alterations, however, have been made by our legislature, but it is manifest that these have no application to the case, where a corporation expires by having lived out its allotted term. The act of 1831, chapter 24 of the revised code, re-enacted in the revised statutes, chapter 26, directs how an information may be filed against a corporation existing *de facto*, in order to procure a judicial decision that it has forfeited its charter, or has been dissolved by the surrender of its franchises or by any other mode, and declares that on a final judgment rendered against the corporation of forfeiture or dissolution, the

consequence shall not be to extinguish the debts due to or from the corporation, but that the court rendering such judgment shall appoint a receiver, and the receiver so appointed shall have full power to collect in his name all debts due to the corporation, to take possession of all its property, and to sell, dispose of, and distribute the same in order to pay off the creditors of the corporation, and afterwards to reimburse the stockholders, under such rules, regulations, and restrictions as the court rendering such final judgment shall direct. These provisions in every part of them contemplate cases, where the termination of the legal existence of the corporation is the consequence of a judicial sentence against it. Where a corporation has lived out the term prescribed by its charter, it is *de facto* defunct. No judicial sentence can be rendered against it. There were, besides, peculiar reasons, demanding this special interposition of the legislature in cases of what might be termed premature death of the corporation. So distressing are the consequences which, according to the common law rule, resulted from a judicial death or dissolution, where the corporation was one that had carried on extensive operations, that the most flagrant violations of charter, the most culpable neglects to make the necessary election of officers, delinquencies of every kind and degree might be committed, and the public authorities would not dare to bring the questions of forfeiture or legal dissolution forward for judicial determination. But these provisions, by removing such distressing consequences, give freedom of action to the agents of the community, while they remove from the managers of corporate institutions the sense of impunity that might render them regardless of law. But the consequences of a regular death by the mere efflux of time could be anticipated by all—provided against by all; and legislative interposition against them was unnecessary.

There can be little or no doubt, therefore, that if the debt in this case had been contracted with the corporation, directly and by name, and the judgment thereon rendered for the corporation, the debt and the judgment would have been to all intents extinguished by the death of the corporation, and the collection thereof could not have been enforced by any legal process. But according to the terms of the original contract, the plaintiff became bound to pay the money to the defendant. This constituted him, and not the bank, the legal creditor of the plaintiff. As such he has obtained his judgment, which is not extinguished by the death of the corporation, and which he has the undoubted

power to collect by legal process. And this brings us to the direct consideration of the great question in the case, is it against conscience in the defendant to collect it?

In presenting this inquiry we may dismiss from our consideration the purposes, to which the defendant professes an intention to apply the money when collected. It is not to be questioned, we think, that on the expiration of the charter, the debts of every kind due from the bank were extinguished as completely as the debts due to it. The stockholders as such were not responsible for those debts, and the expiration of the charter did not throw upon them any such responsibility. There are therefore no outstanding demands against the late corporation, or those who were stockholders therein, which in law or equity can claim to be satisfied out of the money which the defendant seeks to collect. If he collects it, he can not be compelled to account therefor to any one, and may therefore keep it to his own use. We can pay no respect to a pretended trust, the performance or non-performance of which is dependent upon the will of the supposed trustee. If the defendant can rightfully collect this money, it is because he has a right to collect it for his own benefit.

After much consideration, we are of opinion that he has not a right to collect it for his own benefit. In the contemplation of a court of equity, the debt of the plaintiff, so long as it existed, and whether in the form of a note or judgment, was a debt to the bank. The money was borrowed from the bank, and the note given in such form as the rules of the bank prescribed, to secure to the bank repayment of the money so borrowed. The defendant was bare agent or trustee to collect and receive the money for the bank. It never was intended by the contracting parties—the debtors on the one side or the creditor on the other—that he was to derive any benefit from the transaction. It would be, we think, to sacrifice justice to technicalities, substance to form, to regard the defendant as ever having been the creditor of the plaintiff. And if he was not, it is against conscience that he should avail himself of the forms of law to compel payment of what never was, and is not now due to him.

The rights and duties which spring from the relation of trustee and *cestui que trust* are such as ordinarily do not affect third persons. Not being charged with the obligations of protecting those rights or of enforcing those duties, they are not usually responsible for infidelity on the part of the trustee. But when they deal with a trustee in that capacity, they may and often do

contract obligations with the *cestui que trust* himself. If, for instance, in this case the defendant had been removed from his office of cashier, and the plaintiff with knowledge of that fact and that the note was retained in bank, had paid it to the defendant and taken his release, it can not be doubted but that the bank might in equity have compelled the plaintiff to pay the note to them. Yet the removal of the defendant from office would not have changed the legal title in the debt. Suit upon the note, if it had not been paid, must still, notwithstanding such removal, have been brought in the name of the defendant. But a court of equity would have made the plaintiff liable to the bank, because, by reason of the discount of the note, the bank became his creditor—and because the removal would have been a notification that his creditor willed the payment not to be made into the hands of one, who had been selected as trustee because of an office, which he then held, but now no longer filled. If, the moment before the bank charter expired, the corporation had released the debt to the plaintiff, this would have extinguished it in equity, and the defendant would not have been permitted to collect it. That court in these—and in all cases where it may be material to ascertain who is the creditor—will pronounce according to the truth of the transaction, disregarding mere forms. The bank was in truth the creditor. The note and the judgment were but securities belonging to the bank, and proper to be enforced to compel payment to the bank of what was due to it. No one could rightfully put these securities in use, but by the presumed or expressed direction of the bank. Upon the death of the bank without succession or representative, this debt became by law as completely extinguished, as it could have been by a release from the corporation. While there was a debt and a creditor, the trustee could not rightfully enforce the securities but for the payment of the debt to the creditor. After the extinguishment of the debt he can not rightfully enforce the securities, because there is no debt to be paid and no creditor to be satisfied.

In the course of the argument the defendant's counsel pressed upon us with much earnestness the case of *Burgess v. Wheate*, best reported in 1 Eden's Cas. 177. The point there decided by the Lord Keeper Northington with the concurrence of the master of the rolls, Sir Thomas Clark, but against the opinion of Lord Mansfield, was simply that the crown, claiming by escheat, had not a right to compel a conveyance from a trustee, the trust being determined by the death of the *cestui que trust* without heirs.

Assuming that decision to be correct, it must be upon the strict and technical doctrine, that there can not be an escheat, while there is a tenant to render the feudal services. Upon this it was mainly rested by the lord keeper and the master of the rolls. Another ground was indeed taken that a court of equity will not grant a subpoena against a feoffee for one who is not in privity with the feoffor, and therefore the crown, not claiming thus in privity, could not have the aid of the court. This latter ground, however, has been substantially repudiated by subsequent adjudications. In *Middleton v. Spicer*, where the testator had devised chattels real to be sold and given the proceeds to his executors in trust for a charity, which trust was void because of the statutes of mortmain, and there were no next of kin to be found, Lord Thurlow made these impressive remarks: "I do not see how this case is distinguishable in principle from *Burgess and Wheate*. The devise vests the legal property in the executor. The question results whether the executor, being appointed only as a trustee, can take as highly as an occupant at common law. Where there is a trustee the general rule of this court is that he can have no other title. *Burgess and Wheate* was determined upon divided opinions, which continued to be divided, of very learned men. The argument of the defect of a tenant seems to be a scanty one. Whether that case is such an one as binds *speciatim*, or affords a general principle, is a nice question." On a subsequent day, after having fully advised on the case, he decided, that the executors being trustees could not by any possibility take a beneficial interest—that being thus excluded from the beneficial interest, and no relations to be found, the creditors were as much trustees for the crown, as they would have been for any of the next of kin, if these could have been discovered: *Middleton v. Spicer*, 1 Bro. C. C. 201. The authority of this case was distinctly recognized and its principle followed out by Lord Rosslyn in *Barclay v. Russel*, 3 Ves. 424, and by the vice-chancellor, Sir John Leach, in *Henchman v. The Attorney-general*, 2 Sim. & Stu. 498; 1 Cond. Eng. Ch. 559. The decree in this last case was indeed reversed on appeal: See 3 My. & K. 485; 10 Eng. Cond. C. C. 261; but the reversal was upon a ground not at all impugning the authority of *Middleton v. Spicer*. There is little doubt, therefore, that, at this day in England, *Burgess and Wheate* would not be followed, except *speciatim* in a case of proper escheat, and then upon the argument, "scanty" as it is, that upon feudal principles there can

be no escheat, except for the defect of a tenant to render the feudal services: See also 4 Kent's Com. 423, 424.

Perhaps neither the case of *Burgess and Wheate*, nor those in which the doctrine there asserted was revised, have any very close application to the question under consideration. It is not now an inquiry whether the plaintiff can call upon the defendant to execute an alleged trust annexed to property in the defendant's hands. The plaintiff does not seek to disturb the defendant in the enjoyment of any possession he holds, upon a claim that the plaintiff has succeeded, either in the *per* or the *post*, either through or after the corporation, to the beneficial interest of the original *cestui que trust*. The state alone can set up such a claim; and if the property were in the defendant's hands, we do not see why it would not be a valid claim. But the plaintiff asks of the court to prevent the defendant from taking away plaintiff's money to which defendant has no right. And he asks this of the court as a court of equity, because a court of law is unable to look beyond the judgment and pronounce that the defendant is not a creditor. At law the judgment is absolute and conclusive evidence of title in the defendant, to money withheld by the plaintiff. In equity it is but a security for the collection of money, which ought not to be enforced, except in the furtherance of the purposes for which it is held. But it seems to us that the general principles, emphatically laid down by Lord Thurlow in the case of *Middleton v. Spicer*, before referred to, have a strong bearing upon the subject of our inquiry. "Where there is a trustee the general rule of this court is, that he can have no other title." Again, "The executors being trustees can not by any possibility take a beneficial interest." Admit that in the case of an escheat the trustee may be permitted to insist, that the extinguishment of the trust shall operate for his benefit, the case of an escheat is then avowedly an exception from the general rule, which forbids a trustee to claim in contravention of the condition, in which he took the legal interest. Is there any sufficient reason why another exception shall be made, as is contended for by the defendant in this case?

It is urged that although the defendant has no equitable title to this money, neither has the plaintiff; and therefore the court ought not to interfere but suffer the law to prevail. Now, without repeating what has been before stated, that the extinguishment of the creditor's equitable right annihilates the equitable debt so that plaintiff no longer owes, and therefore in equity

has a perfect right to this money, it is enough that he does not owe it to the defendant, to give him an equity against the defendant. The money is yet in the plaintiff's hands—and he has a right to keep it against all the world, unless it be required from him by one to whom it is due, or in behalf of one to whom it is due. *Melior conditio possidentis.*

It is also insisted that the plaintiff acted against conscience in resisting the claim, when preferred against him in behalf of the creditor, and delaying the suit until the charter expired and the debt was extinguished. If this be so, it does not follow that the defendant, by reason of such misconduct, became entitled to the debt thus wrongfully extinguished. The corporation might, before its charter expired, have assigned this debt to the defendant or to any other person, and thus have kept it in existence against the plaintiff. But the corporation did not so will. It preferred to die in quiet, and permit its claims and its injuries to die with it. No one can now assert the former, or redress the latter.

But the resistance made by the plaintiff to the suit at law, while prosecuted by the defendant for the bank, may be deserving of consideration in one point of view. The defendant may have incurred expenses in the prosecution of that suit, against which he ought to be indemnified; and while the plaintiff asks equity he should be compelled to render it. We have doubted, therefore, whether the injunction ought not to be dissolved, so far as respects the collection of the costs of the suit at law. No suggestion, however, of that kind was made upon the argument, and it seems to us that the question of these expenses is not now properly before us. The answer does not set up this equity; nor even aver that the defendant has paid, of his own moneys, or made himself personally liable to pay these costs; and it may be that they have been paid by the bank. As the cause must be remanded, he will have an opportunity, in such mode as he may be advised, of bringing this equity, if it exist, to the notice of the court below, where, no doubt, it will receive due attention.

It is the opinion of this court that there is error in the interlocutory decree appealed from, and that upon the defendant's answer the injunction theretofore granted ought not to have been dissolved. This opinion will be certified to the court below, and the defendant must pay the costs of the appeal.

By Court. Ordered accordingly.

THE EFFECTS PRODUCED BY A DISSOLUTION OF A CORPORATION are discussed in the note to *State Bank v. State*, 12 Am. Dec. 234. In that case it was held, that upon a dissolution of a corporation its lands and tenements reverted to the person by whom they were granted to the corporation; its goods and chattels vested in the crown, and the debts due to or from it were extinguished. The principal case is cited and approved in *Malloy v. Mallett*, 6 Jones' Eq. 345, and *Bank v. Tiddy*, 67 N. C. 169, to the point that choses in action of a corporation become extinct upon its dissolution.

MILLER v. BINGHAM.

[1 IREDELL'S EQUITY, 423.]

PERSONAL PROPERTY, SETTLED TO THE SEPARATE USE of a married woman, is free from any right or control of her then husband; but if he dies, and she subsequently marries, the estate therein vests in such second husband upon his reducing them to possession.

POSSESSION OF A TRUSTEE IS CONSIDERED as that of the beneficiary.

ADVERSE POSSESSION, BETWEEN THE TRUSTEE AND CESTUIS QUE TRUST, can not exist where the trust is express.

CHATTEL IN THE POSSESSION OF THE TRUSTEE of a woman, is not a chose in action, but a chose in possession, and on her marriage will pass to her husband.

BILL in equity. The opinion states the facts.

D. F. Caldwell and Iredell, for the plaintiff.

Waddell and Barringer, for the defendants.

DANIEL, J. Maxwell Chambers, the father of the plaintiff, bequeathed as follows: "I give and bequeath to my son, Edward Chambers, as trustee of my daughter, Anne Chambers (wife of Henry Chambers), the following negroes: Beck, etc., to have and to hold to my said son, Edward, in trust, and for the benefit of my daughter, Anne Chambers, and her heirs forever. It is my wish and request that my son Edward will pay over to my daughter Anne, the profits arising from the said negroes, semi-annually, for her support and comfort." In a codicil to the will, the testator says: "My intention in the devise of the five negroes, to wit, Beck, etc., to my son Edward Chambers, as trustee of my daughter, Anne Chambers, my intention is this: I give the five negroes, to wit, Beck, etc., to Edward Chambers to hold in trust, and for the sole benefit of my daughter Anne, to support her during her life, with the profits arising from the labor and hire of the said five negroes, and their increase. And if my daughter Anne should have lawful issue living, at the time of her death, then I devise and order that the said Edward

Chambers, trustee of my said daughter Anne, shall deliver and convey absolutely, at the death of my said daughter, the said five negroes and increase, to the said lawful issue of my said daughter Anne, living at the time of her death. And if my daughter, Anne Chambers, should die without having issue, that then my son Edward shall convey the said five negroes and increase in equal shares to my heirs, or shall sell the negroes and divide the money in equal proportions among my heirs." Henry Chambers died, and his widow, the said Anne, married George Miller. The trustee died, and George Miller was appointed trustee by the court of equity, and took into his possession the said slaves. George Miller then died, and the defendants are his executors. Anne, the widow, claiming as *cestui que trust*, has filed this bill, for an account of the rents and hires of the said slaves, since the death of Miller, her last husband. The defendants have answered and claim the rents and hires of the negroes, as belonging to the estate of their testator.

That the slaves were well settled by the will to the separate use of Anne Chambers, and excluded any right of her then husband (Henry Chambers) is very clear: *Davis v. Cain*, 1 Ired. Eq. 304; *Rudisill v. Watson*, 2 Dev. Eq. 430. But there is nothing in the will of Maxwell Chambers to show that he anticipated a second marriage of his daughter, and he did not attempt to provide against such a contingency. The equitable interest in the slaves was given to the plaintiff for life. In this court the trust in a thing is the estate in that thing. The plaintiff, therefore, had a right to make an assignment of her interest in the slaves; on her second marriage, therefore, her interest passed to her husband. The second husband took the slaves into his possession. If, however, he had not taken them into his actual possession, and they had been in the possession of any other trustee under the will, still such a possession would not have been adverse to the husband; for the actual possession of the trustee is but considered as that of the person beneficially entitled; indeed the estate of the trustee exists entirely for the benefit of the *cestui que trust*. Where the trust is express, as in this case it is, there can be no adverse possession between the trustee and *cestui que trust*. It is not, however, of course, to divest the trustee of the management of the trust property, and to deliver the possession to the *cestui que trust* for life. It must depend on the intention of the settlor, or him by whom the trust was created: *Tidd v. Lister*, 5 Madd. 429; *Dick v. Pitchford*, 1 Dev. & Bat. 480. A chose in the possession of the

trustee of the *feme*, therefore, is not a chose in action, but it is a chose in possession, and will on her marriage (if a chattel) pass to her husband: *Granbery v. Mhoon*, 1 Dev. 456; *Pettijohn v. Beasley*, 4 Id. 512. A trust is not, as it was formerly held, a chose in action, but a present interest, an estate in possession: *Mitford v. Mitford*, 9 Ves. 98, 99; *Burgess v. Wheate*, 1 Eden, 223, 224; Lewin on Trusts, 523. The circumstance of the trustee being directed to pay the rents and hires semi-annually does not alter the case. In *Benson v. Benson*, 9 Cond. Ch. 201, the testator directed the interest of ten thousand pounds to be for the separate use of his daughter, Jane Lane, the wife of J. Lane, for her life, free from the debts of her husband, to be paid to her at the end of every six months. The husband died, and his widow married again. Held, that the trust for her separate use ceased on the death of her first husband, and that the second husband was entitled to the interest. The same doctrine was laid down by the court in *Knight v. Knight*, 9 Eng. Cond. Ch. 199. These two cases are decisive against the plaintiff on all the points in the case. The bill must be dismissed with costs.

By Court. Bill dismissed with costs.

SEPARATE ESTATE OF MARRIED WOMEN and their control over it: *Thomas v. Folwell*, 30 Am. Dec. 230, and note.

ADVERSE POSSESSION DOES NOT EXIST, and the statute of limitations does not apply, between a trustee and a *cestui que trust* of an express trust: *Shelby v. Shelby*, 5 Am. Dec. 686; *Decouche v. Savetier*, 8 Id. 478; *Kane v. Bloodgood*, 11 Id. 417; *Edwards v. University*, 30 Id. 170, and note. The effects on the rights of the *cestui que trust* produced by the running of the statute of limitations against the trustee in favor of a third person, is discussed in the note to *Collins v. Loftus*, 34 Id. 719.

THE PRINCIPAL CASE IS CITED and approved in *Beall v. Darden*, 4 Ired. Eq. 76; *Harris v. Harris*, 7 Id. 111; *Apple v. Allen*, 3 Jones' Eq. 124, to the point that personal property held in trust for a woman, upon her marriage, vests in her husband.

CASES
IN THE
SUPREME COURT
OF
OHIO.

MILES v. FISHER.

[10 OHIO, 1.]

COURT OF LAW WILL NOT ENTERTAIN QUESTION OF VALIDITY OF TRUSTS, if an estate be conveyed to a grantee capable of taking the trust estate.

DEVISE OF LAND TO TRUSTEES AND THEIR SUCCESSORS, the successors to be appointed by the court of common pleas, is void as to the successors.

DEVISE TO TRUSTEES AND TO THE SURVIVORS or survivor of them, to hold as joint tenants, and not as tenants in common; vests an estate for life in the survivor.

JOINT TENANCY HAS NO EXISTENCE IN OHIO, as distinguished from tenancy in common.

EJECTMENT on an agreed statement of facts from Cuyahoga county. Daniel Miles, the testator, devised his estate to three persons, in trust, and to the survivors or survivor, as joint tenants, and not as tenants in common. After the payment of certain debts, legacies, etc., the net income from the remainder of his estate, for one hundred years, from 1825, was to be applied to the education of certain specified descendants; after the expiration of the one hundred years, the income was to be applied, one half to a certain religious denomination, the other half to the common schools of Newburg. The judges of the common pleas were directed to fill any vacancy that might occur from the death, removal, or resignation of one of the trustees. Three questions were raised in the argument: 1. Whether the succession of trustees did not create a perpetuity. 2. Whether the devise, being for the testator's own family, was not a gift merely, and not a charity. 3. If it is a charitable bequest, is it not so indefinite that it can not be executed?

Wade, Welles, and Hamline, for the plaintiff.

Payne and Wilson, for the defendants.

LANE, C. J. Much industry and learning have been devoted to the investigation of the various questions arising in this case, and the time probably will come which will render their examination necessary. But in an action of ejectment, regarding legal titles, only, it will not be required to enter upon this widely extended field. For the charity may subsist and cling to the land, whether the legal title be held by the trustees or the heir; or the charity may be void and unsustainable, and the beneficial trust inure to the heir, while the trustees retain a good estate at law. The questions therefore raised in argument lie behind that which is presented in the case. We are now only called to consider if the freehold passed by the will, leaving all questions relating to the trusts to be decided in the only proper tribunal.

If an estate be conveyed to a grantee, capable of taking, upon trusts, the question of the validity of the trusts will not be entertained in a court of law. The land passes. If the trusts can be supported, they will be enforced in chancery, at the suit of the *cestui que trust*; if the trusts are void, they may be declared void by the same court, and the beneficial use of the estate reclaimed by the heir. In this case the land was devised to Fisher, Shaw, and Allen; a lawful conveyance with lawful parties, and apt words. It transmitted a title of some nature, upon trusts. The extent of the estate thus created is next to be considered. The testator did not intend to give the trustees an estate in fee, and the statute of 1834 does not operate: 32 Ohio L. 41. He gives the land to them and their successors. This limitation over to their successors is void: for the law does not permit the transmission of an estate to successors, except in a grant to a corporation. The estate in the trustees is for life only, and there is no provision for the continuance of the title at law beyond them; after their death, it descended to his heirs, charged or not charged with the trust, as may be hereafter determined. Two of the trustees are living and one is deceased. The two hold two thirds of the estate, by virtue of the plain words of the will, and it remains to be considered whether the heir may, in this suit, recover the estate held by the deceased trustee.

The testator's words are to "Fisher, Allen, and Shaw," to the survivors or survivor, to hold as joint tenants, and not as "tenants in common." It is urged, that where an estate is limited

in joint tenancy, by express words, the common law incident of survivorship attaches, and that in this case, on the death of Shaw, his share is held by his co-tenants, as long as they hold their own. But it has long since been adjudicated, that the estate of joint tenancy as distinguished from a tenancy in common, has no existence in Ohio: 2 Ohio, 306.¹ Consequently this doctrine of survivorship can not be used to protect this part of the title. Yet the testator intended to give the land to the survivor of the trustees, and every conveyance should be construed to carry the intention of the maker into effect, if made consonant with the principles and forms of law. Laying out of view the doctrine of survivorship, resulting from joint tenancy, an incident of the estate depending upon the law, and not on the act of the party, we find the testator, by express words, limiting the estate to the three trustees and the survivor. The estate well passes, by these words, to the survivor, for life. The remainder in fee is not disposed of. The freehold is given to each trustee for life, and the remainder of the estate for life is given to the other trustees, and the remainder in fee descends to the heir. Such is the legal effect of the donation; and during the lives of the original trustees, or that of the survivor, the heir is precluded from recovering the possession of the estate, by virtue of his legal title.

Without any reference therefore to the trusts which attend the estate, the defendants are entitled to judgment.

Judgment for the defendants.

REQUESTS TO CHARITABLE USES: See *Methodist Church v. Remington*, 28 Am. Dec. 61, and note 67, where the cases in this series on this subject are collected: also, *Sanderson v. White*, 29 Id. 591, and note 599; *Moore v. Moore*, Id. 417; *Burr v. Smith*, Id. 154; *Reformed Protestant Dutch Church v. Mott*, 32 Id. 613; *Curd v. Wallace*, Id. 85. The principal case was referred to in *Williams v. Presbyterian Church*, 1 Ohio St. 503.

JOINT TENANCY HAS NO EXISTENCE IN OHIO: *Sergeant v. Steinberger*, 15 Am. Dec. 553, and note. To this effect the principal case was cited in *Wilson v. Fleming*, 13 Ohio, 73; and *Tabler v. Wiseman*, 2 Ohio St. 210. The *jus accrescendi* is destroyed in Kentucky by statute, in trust estates as well as in all others: *Sanders v. Morrison*, 18 Am. Dec. 161.

MOORE v. ARMSTRONG.

[10 OHIO, 11.]

DISABILITY SAVING HEIR FROM OPERATION OF STATUTE OF LIMITATIONS is no protection to co-heirs.

PARTY SAVED CAN NOT RECOVER HIS ESTATE ON JOINT DEMISE with those whose rights are barred; his recovery must be on a separate demise.

1. *Sergeant v. Steinberger*: 5. C., 15 Am. Dec. 553.

EJECTMENT on an agreed case from Ross county by the lessee of the heirs of one Forqus Moore. On the trial it was proved that the defendants had been in adverse possession for twenty-one years, and also that Mrs. Fleming, one of the lessors of the plaintiff, had been a *feme-covert* since the commencement of the adverse possession. The questions for decision are: 1. Does the disability of Mrs. Fleming prevent the running of the statute against her co-heirs? 2. If not, can she recover her share of the estate on the joint demise from the heirs to the plaintiff?

H. H. Hunter and H. Stanberry, for the plaintiffs.

A. G. Thurman, for the defendants.

GRIMKE, J. Does the disability of Mrs. Fleming prevent the statute from running not only as to herself, but as to all the other lessors? is the first question. And whatever doubt may once have been entertained on this subject, it is now conclusively settled both in Great Britain and the United States, that the statute is saved in favor only of the person laboring under the alleged disability. This is the rule with respect both to coparceners and tenants in common. In *Jackson v. Perry*,¹ 4 T. R. 516, where the question was whether the statute would run against all the joint plaintiffs, if any of them were free from disability, Lord Kenyon observed, that it was remarkable it was the first time the question had been made in the English courts. The action was by partners, and it was held that inasmuch as the suit, to be sustained at all, must necessarily be a joint one, that the statute ran against all the joint plaintiffs, although some of them were free from disability. In *Marsteller v. McClean*, 7 Cranch, 156, which was an action by joint plaintiffs, for the recovery of mesne profits, a similar decision was made. It was held that where once the statute runs against one of two parties entitled to a joint action, it operates as a bar to all. Great reliance, however, is placed upon the form of the pleading. There was a joint replication to the statute of limitations, and it was said that inasmuch as it was bad in part, it was bad in the whole. These were, both of them, cases in which the interest of the plaintiffs was joint. But that is not the case in the present instance. The title is joint, but the interest is several and distinct. Accordingly, in *Langdon v. Rowleston*, 2 Taunt. 440, which was an action of ejectment brought by heirs, it was held that the disability of one of them operated in her favor, although it did not prevent the running of the statute as to the

1. *Perry v. Jackson*.

other, and inasmuch as there was a separate demise from the one who was protected by the statute, the plaintiff obtained judgment for one half of the land. In *Doe v. Barksdale*, 2 Brock. 436, this case was recognized as one of great authority, and the same decision was made upon precisely the same state of facts. It was an ejectment by heirs. The declaration contained both joint and several demises, and it was held that where one of several co-heirs, who labors under no disability, fails to bring his action within the time limited by law, although his right of recovery will be barred, it will not affect those who were under disability; and judgment was accordingly rendered for so much of the land as was claimed by those lessors who were within the saving clause of the statute.

In *Sanford v. Button*, 4 Day, 310, which was also an ejectment by heirs, a different view seems to have been taken of the law, from what was entertained in the two former. There can be no question, it is said, that it is the rule of the common law, that on a joint suit, the disability of one will save the rights of all the others. *Jackson v. Perry*, and *Marsteller v. McClean*, had decided that if the statute had barred the right of one it would bar that of all the others, and *Langdon v. Rowlston*, and *Doe v. Barksdale*, had simply decided, that if the statute had operated to bar one or more, it would not prejudice the rights of the others. But *Sanford v. Button* goes much further, and decides that the rights of none are prejudiced. This proceeds on the idea that the action at common law must necessarily be joint. But as the interests of coparceners are several, although their title is joint, it is plain that they may sue either on joint or separate demises. In *Sanford v. Button*, it is said, the practice peculiar to the state of Connecticut, has varied the rule on this subject, has authorized separate demises to be laid where coparceners sue, and that therefore, if one or more labor under disability, there is no reason why, in that state, the protection should be extended to the others. The rule with regard to the form of declaring, where joint tenants, coparceners, and tenants in common sue, is sometimes thus expressed: that the two former being seized, *per my et per tout*, deriving by one and the same title, and having a joint possession, must join in the action, and that tenants in common having several and distinct titles and estates independent of each other, must count upon separate demises: *Boner v. Juner*, Ld. Raym. 726; *Morris v. Barry*, 1 Wils. 1; *Heathcely v. Weston*, Id. 232. But we have seen that in *Roe v. Rowlston*, and *Doe v. Barksdale*, the demises were separate and

were from coparceners, and they were held to be the only ones on which they could recover. Perhaps it would be more correct to say, that joint tenants must join, coparceners may either join or sever: *Jackson v. Sample*, 1 Johns. Cas. 231; and tenants in common must (independently of the statute of Ohio, which authorizes them to join) sever. Even this last rule, so far as regards joint tenants and tenants in common, is, in practice, annulled in Great Britain; for if a joint tenant bring an ejectment without joining his co-tenant in the demise, it is considered as a severance of the tenancy, and he will be allowed to recover his separate proportion of the land. And if all the joint tenants join in the action, but declare upon separate demises by each, it is held that they may recover the whole premises; because by the several demises the plaintiff has the entire interest in the whole subject-matter, although the joint tenancy is severed by the several letting: *Doe v. Pearson*, 6 East, 173; *Roe v. Lonsdale*, 12 Id. 39; *Doe v. Read*, Id. 57; *Doe v. Fenn*, 3 Camp. 190. And so tenants in common might at common law join in a lease to a third person, stating the demise to the plaintiff to have been made by that lessee. The English cases, however, consider joint tenants as standing upon different ground from coparceners or tenants in common. Their interest is considered so indissoluble that if one or more are barred by the statute, all are barred. In Ohio, coparcenary and tenancy in common are the only species of joint estate known to the law. For the statute permitting partition among joint tenants, and more particularly the statute of wills, which permits them to devise, have by necessary implication abolished the estate of joint tenancy; by destroying its distinguishing feature, the right of survivorship, it has reduced it to a mere tenancy in common; so that the rule may be laid down generally, and without exception among us, that where one of several persons having a joint estate, labors under a disability which is within the saving of the statute, he may take advantage of it, but none others can.

In *Kennedy v. Bruce*, 2 Bibb, 371, it was held, that under the act of Kentucky of 1797, declaring that entries for land shall become void, if not surveyed before the first of October, 1798, with a saving to infants; if any one of the joint owners be under the disability, it brings the entry within the saving as to all the others. The question, however, does not appear to have undergone much investigation, and the law undoubtedly was not so well settled then as it has been since.

There is another class of cases in which it has been held that

the saving in the statute shall be extended to all, although one only may have labored under disability. Thus, in *Kenedy's Heirs v. Duncan*, Hard. 365, it was determined that if one of the persons against whom a decree is rendered be an infant, his infancy will prevent the statute of limitations from barring those who must necessarily join in a writ of error to reverse such decree. And the same decision, upon the same state of facts, was made in *Wilkins v. Phillips*, 3 Ohio, 49 [17 Am. Dec. 579]. Judgment of severance may be given in a writ of error, so as to permit those entitled, to sue upon it without joining the others. But there seems to be this distinction, that if anything may be recovered by two or more plaintiffs in a writ of error, judgment of severance can not be given; but where a writ of error is brought by two or more plaintiffs to discharge themselves from some burden, judgment of severance may be given: Cro. Eliz. 649;¹ Cro. Jac. 117,² 616.³ In *Wilkins v. Phillips*, something was to be recovered, and the alternative presented was, that either none or all should be barred. The court yielded to the most favorable construction, and held that the rights of all were protected.

There is still another question which is presented: whether the plaintiff can recover the interest of Elizabeth Fleming, when she is united with the other lessors who are barred. The interest of one coparcener or tenant in common, whose right is saved, may be recovered in ejectment; but then it must be on a separate demise. If the demise is joint, those who are protected stand upon the same disadvantageous ground as in *Jackson v. Perry*, and *Marsteller v. McClean*, though not for the same reason. As it is competent to them to sue separately, if they choose voluntarily to confound their interests with that of others who have no rights, they must abide the consequences: *Dickey v. Armstrong*, 1 Marsh. 39. In *The Lessee of Adams v. Turner*, 7 Ohio, 136,⁴ it was held that a person possessing title can not combine with himself in a joint demise persons who have no title. The only difference between the two cases, is, that in the former the defect was disclosed by the plaintiff, and in the present it comes out on proof by the defendant. But the evidence is as conclusive in the one case as in the other. Indeed it is much more common for a plaintiff to be defeated by the strength of his adversary's testimony than by the infirmity of his own.

Judgment for defendant.

1. *Easing v. Buddock*.
2. *Bunt v. Smedden*.

3. *Byhal v. Harris*.
4. 7 Ohio, pt. 2, 135.

LIMITATIONS OF ACTIONS.—The first statute limiting the time within which actions must be brought, was passed in the thirty-second year of the reign of Henry VIII. This statute was confined to suits concerning and growing out of land, and did not extend to personal actions. Those who were within "the age of twenty-one years, *covert*, baron, or in prison, or out of this realm of England," were expressly excepted from its operation, and allowed six years after the removal of the disability within which to sue. The statute of 21 James I., c. 16, is the one generally referred to, and the one that has formed the basis of state legislation. This statute extended the limitation to personal as well as real actions, and shortened the time within which suits must be brought. Any person "within the age of one and twenty years, *feme-covert*, *non compos mentis*, imprisoned, or beyond the seas," was allowed ten years from his or her coming of full age, discovery, coming of sound mind, enlargement out of prison, or coming into the realm in which to bring his action; and the statute was inoperative (as to him) during the existence of the disability. The state statutes, though not all following the language of the statute of James, make generally the same exceptions. We will consider the nature and effect of these disabilities in their order.

INFANCY.—The principal questions under this branch of the statute have arisen where property had descended to infant heirs, the statute having commenced to run against the ancestor, or where an infant was a *cestui que trust*, or had a guardian. The first question has been differently decided, but the weight of authority sustains the position that where the statute begins to run against the ancestor, it will continue to run against the heir, though he is under the disability of infancy: *Daniel v. Day*, 51 Ala. 431; *Bowman v. Browning*, 31 Ark. 364; *Rogers v. Brown*, 61 Mo. 187; *Jackson v. Moore*, 13 Johns. 513; S. C., 7 Am. Dec. 398; *Henry v. Carson*, 59 Pa. St. 297; *Faysoux v. Prather*, 1 Nott & M. 296; S. C., 9 Am. Dec. 691; *Haynes v. Jones*, 2 Head, 372; *Williams v. First Presbyterian Soc.*, 1 Ohio St. 478. But in a few of the states, the contrary doctrine prevails, and the statute ceases to run during the minority of the heirs. In Georgia: *Ladd v. Jackson*, 43 Ga. 288; and in Kentucky: *South v. Thomas*, 7 B. Mon. 59; *Machir v. May*, 4 Bibb, 43; *Sentney v. Overton*, Id. 445. But in Kentucky the exception is confined to cases where the infant takes by descent, and if he takes as a purchaser, the statute continues to run: *Patterson v. Hansel*, 4 Bush. 654; nor can purchasers take advantage of the infancy of the heirs: *May v. Slaughter*, 3 A. K. Marsh. 505. In *Cook v. Wood*, 1 McCord, 139, the court approved of the decision in *Faysoux v. Prather*, *supra*, but held that where a party brought an action of trespass to try title, and died *pendente lite*, the bringing of the action stopped the running of the statute, and consequently it would not run against his minor heirs during their minority.

There is also a diversity of opinion on the question as to how far the rights of an infant are affected when his property is in the hands of a trustee, executor, or guardian; and the tendency of the decisions is to support the position that when the right of action vests in an executor, guardian, or trustee, who is under no legal disability, the statute will commence to run despite the disability of the minor, and if the claim is lost by the neglect of the representative to sue, the minor is barred: *Wych v. East India Co.*, 3 P. Wms. 309; *Wilnerding v. Russ*, 33 Conn. 67; *Pendergrast v. Foley*, 8 Ga. 1; *Coleman v. Walker*, 3 Metc. (Ky.) 65; *Darnall v. Adams*, 13 B. Mon. 273; *Couch v. Couch*, 9 Id. 160; *Rosson v. Anderson*, Id. 423; *May v. Slaughter*, 3 A. K. Marsh. 505; *Copee v. Eddins*, 15 La. Ann. 528; *Crook v. Glenn*, 30 Md. 55; *Wellborn v. Finley*, 7 Jones' L. 228; *Bennett v. Williamson*, 8 Ired. L. 121;

Williams v. Otey, 8 Humph. 563. In some of the states the cases hold that neglect in the representative to sue until the statutory period elapses does not affect the minor, and the latter may sue within the statutory time after he comes of age. This view prevails in Alabama: *Moore v. Wallis*, 18 Ala. 458; in Mississippi, *Bacon v. Gray*, 23 Miss. 140; *Pittman v. McClellan*, 55 Id. 229; *Eckford v. Evans*, 56 Id. 18; *Fearn v. Shirley*, 31 Id. 301; and in Texas, *Lacy v. Williams' Heirs*, 8 Tex. 182.

Time does not begin to run against a debt due by the father and natural tutor to his children until his death or their majority, nor against a debt due by the father's succession during his children's minority: *Sewell v. McVay*, 30 La. Ann., pt. 1, 673; and where a testator devised certain slaves for the maintenance of a husband and wife and their children, a conveyance by a second husband of the wife's right in the slaves would not operate to bar the children, and the statute of limitations would not run in favor of the purchaser: *Rankin v. Bradford*, 1 Leigh, 163, and the rule is the same where slaves are conveyed by deed of marriage settlement to the use of the husband and wife for life, and then to their children, and the husband and wife dispose of the property: *Baird v. Bland*, 3 Munf. 570. And a *feme-covert* dying, leaving infant heirs, the statute does not begin to run against them till the termination of the husband's estate by the curtesy: *Kollenbrock v. Cracraft*, 36 Ohio St. 584; *Marple v. Myers*, 12 Pa. St. 122; *Matherson v. Davis*, 2 Coldw. 443; but in Pennsylvania, the heirs have only the same time to enter that the wife would have had, after the termination of the tenancy by the curtesy, though they might be under some disability when the right accrued: *Henry v. Carson*, 59 Pa. St. 297. Under the laws of Texas, where an infant marries, the disability of infancy ceases, and if a cause of action had accrued during the infancy, the statute begins to run from the time of the marriage: *White v. Latimer*, 12 Tex. 61; *Thompson v. Cragg*, 24 Id. 582. But in South Carolina, in *Robertson v. Wurdeman*, 2 Hill, 324, the court held that the marriage of a *feme-sole* did not merge the disability of infancy.

COVERTURE.—A *feme-covert* must be actually married at the time of the accrual of the action, and the saving in the statute does not apply where the *feme* was discovered at that time, notwithstanding she may have subsequently married on the same day: *Wellborn v. Weaver*, 17 Ga. 267; and where a *feme-sole* served the defendant for several years without making any express contract for compensation, the service continuing till the time of her marriage, at which time she was over twenty-one, and the husband and wife brought suit, but after the statutory time elapsed, it was held that the action was barred, as the cause accrued before marriage and the subsequent marriage did not stop the running of the statute: *Killian v. Watt*, 3 Murph. 167. But if she marries before the right of action accrues, she comes within the saving; as where a legacy to a daughter was payable on her marriage, or when she arrived at full age, and she married before her arrival at age: *Wood v. Riker*, 1 Paige's Ch. 616; or where a testator devised his whole estate to his widow, during her widowhood, and to his daughter, after her death, and the daughter married before the mother's death: *Brown v. Crawford*, 9 Humph. 164; or where a slave was given to A. for life, with remainder over to the *feme* plaintiff, and at the death of the tenant for life plaintiff was an infant, and married: *McLean v. Jackson*, 12 Ired. L. 149; and where the grantor of a deed with warranty was a tenant in tail, the first heir in tail after him being an infant, who died before the disability was removed, leaving an infant heir, who became covert before arriving at full age, but brought the suit three years after discovery, she was held not barred: *Doe ex dem. Gilliam*

v. *Jaycocks*, 4 Hawks, 310. But a second marriage does not prevent the running of the statute, when it has commenced to run on the death of the first husband: *McDonald v. McGuire*, 8 Tex. 361; although the statute does not run against the widow of a minor, who died under guardianship, when she remarried before the guardian had made his final account: *Norton v. Thompson*, 68 Miss. 143. Nor does it run against a married woman to whom property is left in trust after her marriage, in a case where she and her husband are suing in equity for the recovery of the property: *Flynt v. Hatchett*, 9 Ga. 328. And the rights of a married woman who is the equitable owner of slaves is not barred by the failure of the trustee in whom the legal title is vested, to institute a suit for their recovery until after the period prescribed by the statute of limitations: *Fearn v. Shirley*, 31 Miss. 301. But a different rule prevails in North Carolina, where it was held that the coverture of a *cestui que trust* did not stop the running of the statute: *Wellborn v. Finley*, 7 Jones' L. 228. If in the settlement between the trustee and the *cestui que trust*, who is a *feme-sole*, the trustee is guilty of fraud, and the *cestui que trust* afterwards marries, but before the discovery of the fraud, the statute does not run against her during her coverture: *Wellborn v. Rogers*, 24 Ga. 558. Time does not run during coverture against a debt due the wife by the husband: *Sevell v. McVay*, 30 La. Ann., pt. 1, 673. And a husband and wife may maintain a suit on an administration bond in favor of the latter, though the bond was barred as to third persons: *State v. Layton*, 3 Harr. (Del.) 469; *Layton v. State*, 4 Id. 8. And if a husband convey property without the wife joining in the conveyance, the statute does not commence to run against her till the death of the husband: *Stephens v. McCormick*, 5 Bush, 181; *Jones v. Reeves*, 6 Rich. 132; *Culler v. Motzer*, 13 Serg. & R. 356. A married woman who executed a mortgage of her land with her husband, is not saved by her coverture from the running of the statute against her title, in favor of the mortgagee: *Hanford v. Fitch*, 41 Conn. 486. If a husband and wife, in possession of the wife's land, are disseised, they have an immediate right of entry, and from that time the statute runs against the husband and also against the wife: *Mellus v. Snowman*, 21 Me. 201. In Georgia, formerly, a party marrying a woman who had land, was entitled to reduce the same to his possession as his property, and the statute ran during the coverture, and it was so decided in *Shipp v. Winfield*, 46 Ga. 593; *Cain v. Furlow*, 47 Id. 674; as there the right of action had accrued before the change in the law. But the law has been changed in that state, and by the laws of 1866, pp. 146, 147, code of 1867, sec. 1744, it was enacted that all property of the wife at the time of marriage, and all subsequently acquired, should vest in and belong to the wife. There have been no decisions under this statute, but its effect would probably be to prevent the statute running as against a *feme-covert*, and make the rule in Georgia conform to the rule in the other states. The statute does not bar a married woman from recovering her separate property, which has been sold under execution against her husband, when her title accrued during coverture: *Michan v. Wyatt*, 21 Ala. 813. But a chose in action accruing to a wife vests in her husband, who may sue for and recover it in his own name, and hence the statute runs notwithstanding the coverture: *Cook v. Lindsey*, 34 Miss. 451.

In most of the states statutes have been passed authorizing married women to bring and defend suits alone, where the action concerns their separate property. As the exception in the statute in favor of married women was based on their disability to sue during coverture, a question has arisen as to how far these statutes removing the disability affect the running of the statute. The states before whose courts the question has been brought, have decided differ-

ently. In California: *Wilson v. Wilson*, 38 Cal. 447; *Cameron v. Smith*, 50 Id. 303; Illinois: *Castnor v. Walrod*, 83 Ill. 171, overruling *Morrison v. Norman*, 47 Id. 477, and *Noble v. McFarland*, 51 Id. 226; Maine: *Brown v. Cousens*, 51 Me. 301; New York: *Ball v. Bullard*, 52 Barb. 141; *Dunham v. Sage*, 5 Lans. 451; and in Ohio: *Ong v. Summer*, 1 Cinc. 424, the courts hold that the effect of the statutes is to take a *feme-covert* out of the exception of the statute of limitations, in all cases where the husband is not a necessary party to the suit. But in Mississippi, *McLaughlin v. Spengler*, 57 Miss. 818, and in North Carolina, *State v. Troutman*, 72 N. C. 551, a contrary doctrine prevails, the courts holding that the passage of these acts does not take a *feme-covert* out of the exception of the statute. In the latter case the court say: "This [the statute removing wife's disability to sue] seems to be a privilege given to married women which may be used for their advantage, but a failure to exercise it is not to operate to their prejudice." And in *Harrer v. Wallner*, 90 Ill. 197, the court held that the act of 1861, authorizing a married woman to hold her separate property as though she were *sole* and unmarried, did not apply to estates by entireties so as to remove the disability of coverture, and did not give her any more rights in relation to that estate than she had before, and hence a statute did run against a woman who was tenant by entirety while the coverture continued. The reasoning adopted by the court in *Ball v. Bullard*, *supra*, is the most satisfactory. In that case the court was called upon to decide the effect of certain acts giving a *feme-covert* a right to sue upon the exception of *femes-covert* in the statute of limitations. At page 146 of the opinion the court says: "It was the disability, by reason of marriage, and not the marriage itself, that was the reason for the exception; and it was the disability, not the marriage, that was removed. As the law previously stood, marriage created this impediment, that the wife could not bring the action alone. * * * The statutes referred to wisely change all this. In their effect, marriage was no longer a disability to the wife. The reason of the law ceasing, the law itself ceases also." And the court decided that the statute ran against a *feme-covert* from the time of the accrual of the cause of action.

INSANITY.—The saving in the statute applies to disabilities arising out of the unsoundness of mind, and does not embrace disabilities to alien and control one's estate which the law may create for the protection of persons who are found by an inquest to be of unsound mind, and whose estate is consigned to commissioners for its management and protection. The disability thus created may continue long after the insanity has ceased: *Clark v. Trail*, 1 Metc. (Ky.) 35. Persons deaf and dumb are *prima facie non compos mentis*, and the statute does not run against them unless they are shown to possess sufficient intellect to know and comprehend their legal rights and liabilities: *Oliver v. Berry*, 53 Me. 206. And defendant beating plaintiff so that he became deranged, brings the plaintiff within the exception: *Sasser v. Davis*, 27 Tex. 656; so also the statute does not run against one of extreme age, who is so imbecile as to be incapable of attending to any business: *Porter v. Porter*, 3 Humph. 586. Where a deed was obtained by one standing in a confidential relation towards another of weak intellect, and the relation and the imbecility continued from the time of the act till the bringing of the suit to be relieved, the statute does not avail the party: *Oldham v. Oldham*, 5 Jones' Eq. 89; and a deed made by a person under a conservator, with the consent of such conservator but without authority from the county court, is void, and the statute does not run as against such person: *Grinwold v. Butler*, 3 Conn. 227. So where a bill of slaves was made by a person *non compos*, who con-

tinues such up to the time of his death, the statute does not run until after administration granted: *Thurman v. Shelton*, 10 Yerg. 383. And where in a deed the names of a guardian and his ward, who was of unsound mind, with other vendors mentioned therein, are recited as parties conveying the interest of the ward, though neither the guardian nor his ward ever sign the deed, it was held that the recital was sufficient to give all subsequent purchasers notice of an unconveyed interest in the ward, and the ward being of unsound mind and legally unable to convey after arriving at her majority, the statute does not run: *Anderson v. Layton*, 3 Bush, 87.

The statute having once begun to run against a party, his subsequent insanity will not stop it: *Clark v. Trail*, 1 Meta. (Ky.) 35; *Allis v. Moore*, 2 Allen, 306; *Adamson v. Smith*, 2 Mill's Const. 269; *Lincoln v. Norton*, 36 Vt. 679. Formerly the Iowa statute made no exception in favor of persons *non compos*: *Shorick v. Bruce*, 21 Iowa, 305; but by the Rev. Code of 1890, sec. 2535, they are excepted from its operation, and are allowed one year after the removal of the disability, in which to sue.

IMPRISONMENT.—But few cases have arisen under this branch of the statute. It has been held that slavery is a disability by imprisonment, and that the statute does not run as against a slave: *Price v. Slaughter*, 1 Cinc. 429; *Matilda v. Orenshaw*, 4 Yerg. 299. And if a party is in prison when the cause of action accrues, and he commences an action after the statutory period has elapsed, but during the continuance of the imprisonment, the statute will have no operation: *Piggott v. Rush*, 4 Ad. & El. 912. But subsequent imprisonment does not stop the running of the statute: *Doe v. Jones*, 4 T. R. 300. In Tennessee the disability of imprisonment is not brought forward from the old statute into the code, and hence does not save the statutory bar: *Bledsoe v. Stokes*, 1 Baxt. (Tenn.) 312.

ABSENCE FROM THE STATE.—The term "beyond the seas," as used in the statute of James, was construed literally; hence persons in Scotland were held not to be within the exception of the statute: *King v. Walker*, 1 W. Bl. 286; and persons in any part of Ireland were held within its meaning and exception: *Anonymous*, Show. 91. But by the 3 and 4 Wm. IV., c. 42, sec. 7, it was enacted that no part of the United Kingdom of Great Britain and Ireland, nor any of the islands adjacent, should be deemed to be beyond seas. In the United States there has been some difference of opinion in the construction of this term, but it has been settled by the preponderance of authority, that "beyond the seas" means beyond the limits of a state, and not beyond the limits of the national government: *Forbes v. Foot*, 2 McC. 331; S. C., 13 Am. Dec. 732; in the note to which case the decisions in the state and United States courts are collected. The exception in the statute of James did not apply to absent defendants. "It seems to have been agreed, that the exception as to persons being beyond sea, extends only where the creditors or plaintiffs are so absent, and not to debtors or defendants, because the first only are mentioned in the statute; and this construction hath the rather prevailed because it was reputed the creditor's folly that he did not file an original, and outlaw the debtor, which would have prevented the bar of the statute:" 3 Bac. Abr. 514; *Hall v. Wybourn*, Carth. 136; S. C., 3 Mod. 311; S. C., Salk. 420; *Swain v. Stephens*, Cro. Car. 333; *Davis v. Yale*, 2 Lutw. 950; *Cheeveley v. Bond*, Show. 202. But by the 4 and 5 Anne, c. 16, the exception was extended to debtors, and by the statute for the amendment of the law, 3 and 4 Wm. IV., c. 42, the same proviso is made. In Pennsylvania it was held that the proviso in the statute did not extend to defendants; who might therefore plead the statute, though

they were beyond the seas during the time which constituted a bar: *Nathans v. Bingham*, 1 Miles (Penn.), 164. And in New Jersey the statutory exception does not include absent creditors, whether citizens or foreigners. Its true intent is to consider the absence or non-residence of a debtor: *Beardsley v. Southmayd*, 3 Green, 171; *Taberner v. Brentnall*, 3 Harr. 263; *Hale v. Lawrence*, 1 Zab. 714; in *Wood v. Leslie*, 6 Vroom, 472, it was said that these cases must be regarded as the settled law of the state. In Missouri it was also decided that the proviso in the statute preventing its operation as against defendants who were absent, applied only to residents of the state at the time the action accrued: *Pike v. Clark*, 55 Mo. 105; and the Georgia courts have decided the same way: *Bishop v. Sanford*, 15 Ga. 1; *Pare v. Mahone*, 32 Id. 253; *Moore v. Carroll*, 54 Id. 126. The same construction has been attempted in other states, but it is firmly settled in England as well as here that the exception extends alike to those who have never been in the state, and whose cause of action rose out of the state, and to those who are resident but are absent: *Strithorst v. Graeme*, 3 Wils. 145; *Lafonde v. Ruddock*, 24 Eng. L. and Eq. 239; *Comqua v. Mason*, 1 Gall. 342; *Thomason v. Odum*, 23 Ala. 480; *Wakefield v. Smart*, 3 Eng. 488; *Hatch v. Spofford*, 24 Conn. 432; *Bishop v. Sanford*, 15 Ga. 1; *Pare v. Mahone*, 32 Id. 253; *Edwards v. Ross*, 58 Id. 147; *McMillan v. Wood*, 29 Me. 217; *Von Hemert v. Porter*, 11 Metc. 210; *Bulger v. Roche*, 11 Pick. 36; *Little v. Blunt*, 16 Id. 359; *Hall v. Little*, 14 Mass. 203; *Wilson v. Appleton*, 17 Id. 180; *Erskine v. Messicar*, 27 Mich. 84; *Estis v. Rawlins*, 5 How. (Miss.) 258; *Bower v. Henshaw*, 56 Miss. 619; *Sissons v. Bricknell*, 6 N. H. 557; *Paine v. Drew*, 44 Id. 306; *Ruggles v. Keeler*, 3 Johns. 263; S. C., 3 Am. Dec. 482; *Crocker v. Arey*, 3 R. I. 178.

A question has also arisen, as to whether foreign corporations are within the exception. In Arkansas, it was held that a foreign corporation was not a "person beyond the limits of this state," within the meaning of the statute: *Clarke v. Bank of Mississippi*, 5 Eng. 516, but the better opinion seems to be, that the proviso includes foreign corporations, and that they stand on the same footing as other foreigners or absentees: *North M. R. R. Co. v. Akers*, 4 Kan. 453; *Robinson v. Imperial Mining Co.*, 5 Nev. 44; *Olcott v. Tioga R. R. Co.*, 20 N. Y. 210. In Vermont, the statute was held not to commence to run till the corporation had attachable property in the state, though there might be directors and stockholders of the corporation there: *Hall v. Vt. & Mass. R. R. Co.*, 28 Vt. 401; but where a corporation has a managing agent in the state, who exercises his authority openly as such, service of process may be had on him, and the statute runs: *Lawrence v. Ballou*, 50 Cal. 258. In *Faulkner v. Delaware and Raritan Canal Co.*, 1 Denio, 441, the court held that the statute applied to natural persons only, and not to corporations, and in *Olcott v. Tioga R. R. Co.*, *supra*, the same construction was contended for. The strongest ground for sustaining this position was, that a returning to a state, or a departing from it, were acts that could not be predicated of any but natural persons. The court, in pronouncing its opinion, argued that the same reasoning which brought foreigners within the proviso would apply to foreign corporations, and held that they were within the exception, and overruled *Faulkner v. Delaware and Raritan R. R. Co.* Denio, J., said: "The courts have uniformly applied to statutes of limitation a liberal construction, and, in many instances, have accommodated the strict language of the act so as to effectuate the general intention of the legislature. * * * If the consequence is, that a corporation in another state or country can not enjoy the advantage of our act of limitation, the same is true of a natural person domiciled abroad and whose circumstances prevent his coming within our jurisdiction."

tion. The policy of our law is, that no persons, natural or artificial, who are thus circumstanced, can impute laches to the creditors, or those claiming to have rights of action against them, in not pursuing them in the foreign jurisdiction where they reside. * * * In engrafting this policy upon the statute, the legislature made use of general words, which, though adequate to describe a corporation, did not contain any language referring specifically to a debtor who could not, by its constitution, pass from one territorial jurisdiction to another."

Under the statute of James, if a cause of action had once accrued, a subsequent departure from the state did not prevent the continued operation of the statute: *Plowd.* 366; *Smith v. Hill*, 1 Wils. 134; the same construction was adopted by some of the earlier decisions in the United States: *Peck v. Randall*, 1 Johns. 165; *Winn v. Lee*, 5 Ga. 217; and in Missouri, up to the present day, absence or non-residence does not prevent the running: *Smith v. Newby*, 13 Mo. 159; *State v. Willi*, 46 Id. 236; but these decisions rest upon the language of the statute, which does not make an exception of absentees or non-residents, and in the code of procedure of 1879, sec. 3222, they are not included among the persons under disabilities. However, in *Douthitt v. Stinson*, 63 Mo. 269, the court held, that the period during which a person was absent in the confederate states during the war was to be deducted, as the courts of Missouri were closed to him during that time, following the decision of *Hanger v. Abbott*, 6 Wall. 532. In most, if not in all, of the other states, the statutes now allow certain periods of absence to be deducted in the calculation of the statutory time. What periods of absence are deducted vary in the different states; we will consider these different periods as they have been interpreted by the courts.

In some states, successive absences, temporary or otherwise, may be added together and their aggregate deducted in computing the time the statute has run. This is so in California: *Rogers v. Hatch*, 44 Cal. 280; in Alabama: *Smith's Heirs v. Bond*, 8 Ala. 386; *Crocker v. Clements*, 23 Id. 296; in Texas: *Fisher v. Phelps*, 21 Tex. 551, and in New York: *Harden v. Palmer*, 2 E. D. Smith, 172; *Ford v. Babcock*, 2 Sandf. 518; *Cutler v. Wright*, 22 N. Y. 472; *Cole v. Jessup*, 6 Seld. 96. In *Cole v. Jessup*, 2 Barb. 309, it was held that the exception covered only a single departure and return, and that then the statute ran notwithstanding subsequent departures; but in 6 Seld. 96, the case coming up on appeal, the court expressed the opinion that successive absences could be aggregated, but the decision was affirmed, as the appellate court came to the same conclusion on another view of the statute. And *Ford v. Babcock*, *supra*, expressly denies the conclusion of *Cole v. Jessup*, 2 Barb. 309. In most of the states, however, temporary absences are not to be excluded. In Massachusetts temporary absences, however long continued, if they are not of such a character as to change the domicile, are not to be deducted in computing the time: *Langdon v. Doud*, 6 Allen, 423; *Colleston v. Hailey*, 6 Gray, 517. The same rule prevails in Minnesota: *Venable v. Paulding*, 19 Minn. 488, and in Maine, it was held that so long as a debtor has such a residence in the state as to make him subject to the jurisdiction of its courts, the statute continues to run despite absence: *Bucknum v. Thompson*, 38 Me. 171; *Drew v. Drew*, 37 Id. 389. Other states uphold the theory that temporary absences do not prevent the operation of the statute. Thus, where a defendant domiciled in Connecticut, publicly left his family and property there and went out of the state at different times to one of the southern states, each time for a period of eight months, intending a temporary absence only, without abandoning or intending to abandon his domicile, he was held not to be absent, within the meaning of the statute, and these periods were not to be deducted: *Sage v.*

Hawley, 16 Conn. 106. And if a party having a home in Mississippi, goes abroad for his health, staying several months, the statute continues to run: *Lent v. Pintard*, 50 Miss. 265; *Fisher v. Fisher*, 43 Miss. 212. So, also, if a party goes to California, intending to return and stays several months: *Gaith v. Robards*, 20 Mo. 523; though if a person leaves Missouri, intending to reside in another state, the statute ceases to run: *Lackland v. Smith*, 5 Mo. App. 153. And where a citizen of Kansas, having a furnished house there, was personally out of the state attending to his duties as United States senator, the period of his absence should be deducted: *Lane v. Nat. Bank of the Metropolis*, 6 Kana. 74; nor where a party is absent for nine years, shall the period of his absence be computed: *Poston v. Smith*, 8 Bush, 589. And absence from the state as a volunteer soldier or officer constitutes an absence within the meaning of the proviso excepting the time during which the defendant is absent on "public business:" *Gregg v. Matlock*, 31 Ind. 373. Though in *Graham v. Commonwealth*, 51 Pa. St. 255, it was held that where a defendant entered into the military service of the United States, his absence was temporary and did not prevent the statute's running; and in *O'Neal v. Boone*, 53 Ill. 35, it was decided that where the plaintiff voluntarily entered and remained in the confederate lines, the statute was not suspended. But where a party was in the British lines during the war and departed with the British at the close of the war, he was held to be out of the state: *Sleight v. Kane*, 1 Johns. Cas. 76.

Some states make the fact as to whether legal service can be made on the defendant or not, the criterion in determining whether absence will prevent the running of the statute. In these states the rule is that if a debtor, though personally absent from the state, so maintains his residence within it that process may be served upon him, he is not absent in the meaning of the statute. This view prevails in Indiana: *Niblack v. Goodman*, 67 Ind. 174; Illinois: 4 Gilm. 125; Iowa: *Penley v. Waterhouse*, 1 Clarke (Iowa), 498; Nebraska: *Blodgett v. Utley*, 4 Neb. 25; Vermont: *Hackett v. Kendall*, 23 Vt. 275; *Hall v. Nasmith*, 28 Id. 791; Missouri: *Miller v. Tyler*, 61 Mo. 401; and in that case it was held that where one departed from the state, leaving a residence and family therein, and afterwards the family abandoned the dwelling-place and removed to the house of a relative in another county, he will be held to have no usual place of abode where service of process might be had upon him, and hence the statute ceased to run; and that a party leaving his attachable property there makes no difference: *Lackland v. Smith*, 5 Mo. App. 153. In New Hampshire, a defendant who had a domicile in New Hampshire, but went out of the state in the spring to get work and returned in the autumn, and did so for some years, leaving his wife there in a house hired for her, where he supported her and paid taxes, coming home on Saturdays and returning on Sunday, was held to be protected by the statute because he at all times had a domicile within the state at which service of summons could be made: *Gilman v. Cutts*, 27 N. H. 348. In the same case, coming up at a previous term, the court decided that any and every absence from the state, temporary or otherwise, which is such that the creditor can not during the same make legal service, must be reckoned, and that the statute ceased to run during each and all of the absences: S. C., 23 N. H. 376; which opinion was approved on the second hearing. And the same proposition was laid down in *Bell v. Lamprey*, 52 Id. 41; where a party leaves the state with his family on a voyage, expecting to be gone three years, leaving property in the state in care of his father-in-law, the statute does not run: *Ward v. Cole*, 32 Id. 452; and the time of the debtor's absence from the state, which continued many years without interruption, is to be excluded in com-

puting the time for the commencement of personal actions, though his wife and child continue to reside on his homestead farm: *Brown v. Rollis*, 44 Id. 446.

In Georgia, it was decided that where a defendant removed from the state, with an intention not to return, but subsequently changed his purpose, and did return, the time of his absence should be deducted in ascertaining if the statutory time had elapsed, though the court said it would be otherwise if he was simply temporarily absent: *Sedgwick v. Gerding*, 55 Ga. 264. In *Moore v. Carroll*, 54 Id. 126, a defendant had made a note in California and subsequently removed to Georgia, where he was sued; the court held that the period of his non-residence should not be deducted, as he had not removed from the state since the making of the note, so as to bring him within the exception of the statute. The statute will not run so as to bar recovery for real estate, notwithstanding the non-resident may always have had a tenant in possession: *Heaton v. Fryberger*, 38 Iowa, 185; nor would it run against the absent holder of a note, though his agent in the state had possession of it: *Wilson v. Keller*, 8 Ark. 507.

A discussion of the question of absence from the state involves a further inquiry as to what constitutes a return into the state so as to remove the bar of the statute. Generally a notorious and open return, so that the debtor may be sued, is sufficient to remove the bar of absence: *Ingraham v. Bowie*, 33 Miss. 17; *Ford v. Babcock*, 2 Sandf. 518; *Fowler v. Hunt*, 10 Johns. 464; even though the creditor did not know of the return: *Didier v. Davidson*, 2 Sandf. Ch. 61; S. C., 2 Barb. Ch. 477. But where the debtor returned privately, and secreted himself, except on Sunday, it is not a return within the contemplation of the statute: *White v. Bailey*, 3 Mass. 270; nor where a defendant, residing in New Brunswick, frequently but temporarily comes into Maine to the creditor's place of business, with attachable property, and paid him money: *Hacker v. Everett*, 57 Me. 548; nor where the debtor comes a few miles into the state with attachable property, which is removed on his return to his own dwelling, the creditor not knowing of it: *Crosby v. Wyatt*, 10 Shep. (Me.) 157; and in *Hill v. Bellows*, 15 Vt. 727, the court rendered a similar decision. A return must be such that the debtor is subject to the process of the courts. Hence a removal to the Indian nation is not a return, as the process of the courts does not run there: *Smith v. Heirs of Bond*, 8 Ala. 386. And the statute runs, though the creditor is ignorant of the return, where such ignorance was not occasioned by the improper conduct of the party returning: *Smith v. Newby*, 13 Mo. 159. Though in *Campbell v. White*, 22 Mich. 194, the court held that the debtor must either show that the return was known to the creditor, or that it was so protracted and notorious that the creditor might, with reasonable diligence, have learned of it. In *Robertson v. Smith's Heirs*, Litt. Sel. Cas. 296, the court said that by merely coming into the state, a non-resident loses the benefit of the statute.

Cases have arisen involving the question as to how far the statute runs when a non-resident has a place of business within the state. Wherever this question has been raised, the courts have held that the statute does not run while the party is in the state on business: *Rockwood v. Whiting*, 118 Mass. 337; *Edgerton v. Wachter*, 9 Neb. 500; *Burroughs v. Bloomer*, 5 Denio, 532; *Bassett v. Bassett*, 55 Barb. 505. Thus, where the cause of action arose in Iowa, where the defendant then resided with his family, and he carried on business in Plattsburg, in Nebraska, where he was present every day for nearly three years, and subsequently removed to Plattsburg, it was held that the statute did not run against him till his removal: *Edgerton v. Wachter*, *supra*. And the same conclusion was arrived at in *Bassett v. Bassett*, *supra*,

where the defendant resided and kept house in New Jersey, and transacted business in New York on week days, returning home in the evenings. The courts can not, by construction, add the disability of absence to the statute, and it is not an exception, unless expressed: See note to *Morgan v. Robinson*, 13 Am. Dec. 368, where this subject is fully discussed.

HOW FAR DISABILITY OF ONE AFFECTS RIGHTS OF OTHERS.—In England, in *Roe v. Roulston*, 2 Taunt. 441, it was decided that if an estate descend to parceners, one of whom is a *feme-covert*, the disability did not prevent the running of the statute as to the other parcener, who would be barred if she failed to enter in the statutory time. And in *Perry v. Jackson*, 4 T. R. 516, where one partner was beyond seas, and the action was brought within the statutory time from his return, though not within the statutory time from the accrual of the action, the court held that the action was barred, on the ground that one of the plaintiffs could have acted for the others and used their names in an action, and that he should have done so. But in *Fannia v. Anderson*, 14 L. J. Q. B. 282, the absence of one co-contractor beyond the seas was held to prevent the statute's running. The court referred to the decision of *Perry v. Jackson*, and distinguished that case from the one before it, saying, "With respect to defendants the reason [of *Perry v. Jackson*] does not apply; the plaintiff can not bring the absent defendant into court by any act of his; and therefore, if he be compelled to sue those who are within seas, without joining those who are absent, he may possibly recover against insolvent persons, and lose his remedy against the solvent ones who are absent. On the other hand, if he sues out a writ against all, and either continues it without declaring, or proceeds to outlawry against the absent parties, and declares against those within seas, he is placed in precisely the same situation as if the statute of Anne had never passed, and is obliged to incur fruitless expense, the avoiding of which seems to have been the object of the statute of Anne."

In the United States the states differ as to the effect of the disability of one on the rights of the other parties in interest. Where the interest is joint, the preponderance of authority supports the proposition that if the right of one is barred, the rights of all are barred, notwithstanding some may labor under a disability: Freeman on Co-tenancy and Partition, sec. 375; *Hardeman v. Sims*, 3 Ala. 747; *Jordan v. McKennie*, 30 Miss. 32; *Riden v. Frior*, 3 Murph. 577; *Morgan v. Reed*, 2 Head, 276; *Wells v. Ragland*, 1 Swan, 501; *Marsteller v. McClean*, 7 Cranch, 156; *Roberts v. Ridgeway*, Litt. Sel. Cas. 394; *Milner v. Davis*, Id. 436; *Robertson v. Smith*, Id. 296; S. C., 12 Am. Dec. 304; *Dickey v. Armstrong*, 1 J. J. Marsh. 39; *Simpson v. Shannon*, 3 A. K. Marsh. 462; *Allen v. Beal*, Id. 554; *Riggs v. Dooley*, 7 B. Mon. 236; *Clay v. Miller*, 3 Mon. 146; *Moore v. Calvert*, 6 Bush, 356; but see *May v. Bennett*, 4 Litt. 311; *Kennedy v. Duncan*, Hardin, 365, and *Harlan v. Seaton*, 18 B. Mon. 312. "The statute protects the rights of those who are incompetent to protect themselves, but where some of the parties are competent they ought to take care of the interests of all by prosecuting a suit within time:" per Taylor, C. J., in *Riden v. Frior*, *supra*. In some states a contrary rule prevails, and the disability of one of several parties jointly interested will protect all: *Wilkins v. Philips*, 3 Ohio, 49; *Sturges v. Longworth*, 1 Ohio St. 544; *Riddle v. Roll*, 24 Id. 572; *Priest v. Hamilton*, 2 Tyler, 44. In South Carolina the same rule seems to prevail: *Lahiffe v. Smart*, 1 Bailey L. 192; *Thomson v. Gaillard*, 3 Rich. 418; though in *Henry v. Stewart*, 2 Hill (S. C.), 328, where several joint plaintiffs brought an action of trover, the court held that one plaintiff not barred might recover his interest and the others fail. In New York the absence of one joint debtor from the state was held to suspend the statute,

though a co-debtor remained in the state: *Bogert v. Vermilya*, 10 N. Y. 447; *Denny v. Smith*, 18 Id. 567, overruling *Brown v. Delafield*, 1 Denio, 445, which held a contrary doctrine.

Where the rights of the parties are not joint, the cases are uniform, and hold that the disability of one will prevent the operation of the statute as to him, but that those who are not under a disability will be barred; *Wilder v. Mayo*, 23 Ark. 325; *Gray v. Trapnall*, Id. 511; *Daniel v. Day*, 51 Ala. 431; *Doolittle v. Blakesley*, 4 Day, 265; *Sanford v. Button*, 4 Id. 310; *Bryan v. Hinman*, 5 Id. 211; *Jordan v. Thornton*, 7 Ga. 517; *Pendergrast v. Gullatt*, 10 Id. 218; *Peters v. Jones*, 35 Iowa, 512; *Thomas v. Machir*, 4 Bibb, 412; *Den v. Black*, 5 Ired. L. 463; *Moore v. Armstrong*, 10 Ohio, 11 (the principal case); *Bronson v. Adams*, Id. 135; *Williams v. First Presbyterian Soc.*, 1 Ohio St. 478; *Barrows v. Navee*, 2 Yerg. 227; *Wade v. Johnson*, 5 Humph. 117; *Stovall v. Carmichael*, 52 Tex. 383.

WHERE ALL PARTIES LABOR UNDER DISABILITIES, OR SEVERAL DISABILITIES EXIST IN ONE PARTY.—Where all parties in interest labor under disabilities, the statute does not begin to run till the disabilities of all have been removed: *Shute v. Wade*, 5 Yerg. 1; *Masters v. Dunn*, 30 Miss. 264; *Scay v. Bacon*, 4 Sneed, 99; *Clay v. Miller*, 3 Mon. 146; *Wells v. Ragland*, 1 Swan, 501; *Moore v. Calvert*, 6 Bush, 356. A party is entitled to all the disabilities existing when the cause of action accrued, and if several disabilities exist together in a party when the cause of action accrues, the statute does not begin to run till all the disabilities have terminated: *Jackson v. Johnson*, 5 Cow. 74; S. C., 15 Am. Dec. 433; *Butler v. Howe*, 13 Me. 397; *Dugan v. Gittings*, 3 Gill, 138.

SUBSEQUENT OR SUCCESSIVE DISABILITIES.—It is settled beyond dispute, that if the statute has once commenced to run, no subsequent disability can stop it; nor can any intervening disability be added to one existing when the cause of action accrued, to extend the statutory period for bringing actions. This principle is so well settled, that a further citation of authorities is unnecessary. It must, however, be taken with the limitation provided for in many states in regard to subsequent absences. Some of the courts have added another limitation to this doctrine. These cases hold, that where the subsequent disability grows out of some positive statutory enactment of the legislature, the time of such disability should be excluded: *Planters' Bank v. Bank of Alexandria*, 10 Gill & J. 347; *Dowell v. Webber*, 2 Smed. & M. 452; *Moses v. Jones*, 2 Nott & M. 259. But the want of administration on an estate does not prevent the running: *Brown v. Merrick*, 16 Ark. 612; *Byrd v. Byrd*, 28 Miss. 144; *Nicks v. Martindale*, Harper's L. 135; S. C., 18 Am. Dec. 647; though where in consequence of a controversy as to the probate, letters testamentary were not granted till five years after the creation of the debt, and the statutory period expired after the letters were issued, but before the creditors could compel an accounting, it was held that the claim was not barred, in *Skidmore v. Romaine*, 2 Brad. (N. Y.) 123.

MILFORD AND C. T. CO. v. BRUSH.

[10 OHIO, 111.]

CORPORATION IS SUFFICIENTLY ORGANIZED TO BIND SUBSCRIPTION to the capital stock, when the parties mentioned in the charter have, in pursuance of its terms, by written articles of association, organized themselves, and opened books of subscription.

SUBSCRIPTION IS NOT VOID FROM MISTAKE IN CORPORATE NAME, and the contract will operate in favor of those for whose benefit it was intended. **AMENDMENT OF ACT OF INCORPORATION WILL NOT EXONERATE PREVIOUS SUBSCRIBERS** from their subscription, when the change produced by the amendatory act is but trifling.

LEGISLATURE MAY WAIVE FORFEITURE OF CORPORATE RIGHTS, and an act extending the time of the commencement of certain work amounts to a waiver of the forfeiture incurred by the corporation's failing to commence the work within the time prescribed by the act of incorporation; and the liability of stockholders is not affected by the extension.

ASSUMPSIT. In 1832, the Ohio legislature incorporated several individuals as the Milford and Chillicothe Turnpike Company, for the purpose of constructing a road from Milford to Chillicothe. The corporation was to commence work within three years, otherwise the rights granted by the charter were to cease. The charter was accepted, the company organized, and books opened. The defendant subscribed for four shares. The company failed to commence work within three years, but in 1835, the legislature, by an amendatory act, allowed them three years further time, in which to commence work. The plaintiff instituted this suit to recover seven installments due upon this subscription.

Thurman and Taylor, for the plaintiff.

Brush and Leonard, for the defendant.

HITCHCOCK, J. The plaintiffs in this case having shown the act of incorporation, the acceptance of that act, the opening of books of subscription, the subscription by the defendant, and the calls made for installments on the stock so subscribed, make out a *prima facie* case and right of recovery, unless the points of defense raised by the defendant are such as to defeat that right.

The first objection made by the defendant to the right of action is, that the subscription is a nude pact, as no engagement was or could be made on the part of the company so as to create mutual engagements. This exception is founded in part, if not principally, upon the hypothesis that there was no corporation in existence at the time the subscription was made. But this is a mistake. By the second section of the act of incorporation, the company, that is, the individuals named in the act, or "so many of them as choose to do so, by written articles of association," are authorized to organize themselves, and open books of subscription: 30 Ohio L. 239. Such organization was had before the books were opened, whereby the act of incorporation

was recognized and the company became a body corporate. Under these circumstances, there was sufficient mutuality in the contract, and the subscription obligatory on the defendant: *Goshen Turnpike Co. v. Hurtin*, 9 Johns. 217 [6 Am. Dec. 273]; *Dutchess Cotton Man. Co. v. Davis*, 14 Id. 238 [7 Am. Dec. 459]. But even should it be considered that the act of incorporation did not take effect until the company was organized by an election of officers by the stockholders, still we should hold that the subscription would be binding. A sufficient consideration would be found in the anticipation of profits in tolls to be received from those using the road.

The next objection is, that the contract was not with the plaintiffs, but with a "president and directors" thereafter to be chosen or appointed. There can be no doubt as to the intent of this contract. The object of the subscription was to aid "The Milford and Chilicothe Turnpike Company" in the construction of a road. The object being well understood, the subscription can not be avoided on account of a mistake made in the corporate name, and the contract will operate in favor of those for whose benefit it was intended: *Commissioners of the Canal Fund v. Perry*, 5 Ohio, 56. By this subscription, informal though it might have been, the defendant became a stockholder in the company, entitled to all the privileges and immunities of any other, and like any other stockholder is bound to pay according to the legal effect of his subscription. Another objection made by the defendant is, that the suit, if sustained at all, must be in the name of the "president and directors of the Milford and Chilicothe Turnpike Company." If we are correct in supposing that this contract is, in law, a contract with the "Milford and Chilicothe Turnpike Company," then the suit is properly brought in the name of that company: *Commissioners of the Canal Fund v. Perry*, Id.

It is next claimed that the defendant was released from the obligation of his subscription by the change made by the amendatory act, in the route and in the grade of the road. That there might be such change made in the route of a turnpike road as to exonerate those who had previously subscribed for its construction, will not be denied, but that every trifling change so long as the termini remain the same, will have this effect, can not be admitted. By the original act of incorporation, the line of the road is to be "on the nearest and best route," between Milford, in the county of Clermont, and Chilicothe, in the county of Ross. By the amendatory act the termini of the road

remain the same, but Bainbridge and Hillsborough are made points in the route. Now whether here is in fact any change in the route does not appear. From anything before the court these two places may be actually on the line of the "nearest and best route." As a matter of fact we know that they are, if not exactly, very nearly on a line from Milford to Chillicothe. It still remains to be shown that there has been any material change in the route of the road, and until it is shown this court will not presume it. So far as respects the angle of the road with the horizon, it will be found that there is nothing in the amendatory act absolutely compulsory. If the nature of the ground be such, that it be practicable to reduce this angle to two degrees, it must be done; if not, the road may be constructed at a greater angle, not however, in any event to exceed four and one half degrees.

It is again claimed, that the defendant is discharged from his subscription in consequence of the failure of the corporation to commence work upon the route within three years next after the act of incorporation was passed. The eighteenth section of the act is as follows: "If said company shall not within three years from the passage of this act proceed to carry on said work, or shall not within ten years thereafter, complete thirty miles of said road, according to the true intent and meaning of this act, then and in either of those cases, all the rights, liberties, and privileges granted by this act shall cease." It is contended by the defendant that the true intent and meaning of the words, "carry on said work," is, that the corporation shall actually commence operations upon the road by manual labor, while a different construction is insisted upon by the plaintiffs. We apprehend, however, that it is not necessary for the purposes of this case definitively to determine what is the true construction of the phrase. Assuming for present purposes that the defendant is correct as to the construction, how stands the case?

The first step to be taken was to organize the company, that it might take the benefit of the act. Being so organized it became a body corporate and politic, a corporation possessed of all the powers, rights, liberties, and privileges granted by the act by which it was created. So long as it complied with the requisitions of its organic law, it would not be divested of any of these powers, rights, and privileges granted. It had certain duties to perform. One of these was to commence work upon the road within three years. This was not done, and what is the consequence? Did the corporation cease to exist? We ap-

prehend not. The corporation must have been in existence before it could have commenced the work, and having failed to commence it still continued to exist. But the failing was good ground of forfeiture, and upon a proper proceeding before this court, such forfeiture would have been adjudged. But the supreme power of the state might waive the forfeiture, and the case shows that it was waived. The legislature at the instance of the corporation, and it must be remembered that the defendant was a member of this corporation, gave further time within which to commence the work. By this law the corporation was not divested of any right, but had in fact an additional right conferred upon it. It is placed precisely in the situation it would have been had the time, originally prescribed, within which to commence the work, been fixed at six years; and of course the obligation of the defendant remains unchanged.

Judgment for the plaintiff.

LIABILITY OF STOCKHOLDER ON HIS SUBSCRIPTION: See note to *Franklin Glass Co. v. Alexander*, 9 Am. Dec. 96, where this subject is discussed at length; *Bend v. Susquehanna Bridge Co.*, 14 Id. 261. Where a corporation obtains an act extending or otherwise materially changing the objects for which it was originally incorporated, a stockholder who has not assented to the change is not liable for additional assessments in furtherance of such additional object: *Union Locks etc. v. Towne*, 8 Id. 32. But subscriptions to a corporation for the location of a public road are subject to the power of the legislature to change the location of the road at an intermediate point, unless the contrary be expressed: *Ireia v. Turnpikes Co.*, 23 Id. 53.

RHODES v. CITY OF CLEVELAND.

[10 OHIO, 159.]

CORPORATION IS LIABLE FOR DAMAGES for consequential injury arising from an act done in the exercise of its ordinary powers.

WRIT of error to the common pleas of Cuyahoga county. The plaintiff brought an action on the case against the defendant for cutting ditches and water-course, so as to wash away his land. The court charged the jury, that in order to sustain his action, the plaintiff must show either that the city acted illegally, or if it acted legally, that it was guilty of malice. The jury found for the defendant, and plaintiff appealed.

D. Parish, for the plaintiff.

H. B. Paine, for the defendant.

LANE, C. J. The question arising from the record is whether

a corporation is liable to repair damages, for a consequential injury, arising from the exercise of its ordinary powers. In the elder cases, while courts were hampered by the notion, that corporate acts were to be performed under the authority of their seals, no suits like the present were held to be maintainable, but the agents only were regarded as responsible to person injured. Since the great increase of corporations, and since so much of the business of the world is transacted through their agency, it becomes necessary that courts should meet their expanding powers, by an extension of the limits of their liability. And one of the peculiar benefits which our system of jurisprudence possesses, is its capacity of enlargement and adaptation to the exigencies of the varying forms of social life. That the rights of one should be so used, as not to impair the rights of another, is a principle of morals, which from very remote ages has been recognized as a maxim of law. If an individual, exercising his lawful powers, commit an injury, the action on the case is the familiar remedy: if a corporation, acting within the scope of its authority, should work wrong to another, the same principle of ethics demands of them to repair it, and no reason occurs to the court, why the same remedy should not be applied, to compel justice from them.

In a case like the present, I do not look so much for precedents, as to the following out of incontestable principles: for the current of decisions, for a long time, has been to increase the liabilities of corporations. Every year furnishes new examples, of the extension of remedies against them, where an injury is done, and remedies are applicable. It does not therefore appear to me to be a sufficient reason, against sustaining this suit, that in other states the remedy is not extended so far. But no decision of our own state goes to deny the right to the present action. In the two cases reported in 4 Ohio, 500,¹ 514,² we held the corporation of Cincinnati liable for injury done by grading, either illegally or maliciously. This was regarded as carrying the law beyond decided cases. In *Scovil v. Geddings*, 7 Ohio, 211,³ we held the agents of the trustees of the town not liable, because they were acting within their jurisdiction. In *Hickox v. The City of Cleveland*, 8 Id. 543 [32 Am. Dec. 730], we held the city not liable by action, for an injury by grading, because the statute conferring the power, prescribed a form of assessing damages, by which compensation might be made.

1. *Goodloe v. Cincinnati*; 8. C., 22 Am. Dec. 764.

2. *Smith v. Cincinnati*.

3. 7 Ohio, pt. 2, 211.

Upon the whole then, we believe that justice and good morals require that a corporation should repair a consequential injury, which ensues from the exercise of its functions, and that if we go further than adjudicated cases have yet gone, we do not transcend the line, to which we are conducted by acknowledged principles.

We hold, therefore, that corporations are liable like individuals, for injuries done, although the act was not beyond their lawful powers.

Judgment reversed.

LIABILITY OF CORPORATION FOR INJURIES DONE BY IT.—Case of trespass will lie against a corporation for a tort committed by it: *Chestnut Hill T. Co. v. Rutter*, 8 Am. Dec. 675; *Lyman v. White River Bridge Co.*, 16 Id. 705; or for a neglect of corporate duty: *Riddle v. Proprietors*, 5 Id. 35. A municipal corporation is indictable for neglect to remove a nuisance in a public river, which it had power to remove: *People v. Albany*, 27 Id. 95, and note; and a municipal corporation is bound to repair highways within its bounds at the expense of the inhabitants: *Bancroft v. Lynnsfield*, 29 Id. 632; though at common law no action lies against a town for damages occasioned by a defective highway: *Mower v. Leicester*, 6 Id. 63; nor are the inhabitants of a town liable for the repair of a bridge erected without their authority: *Commonwealth v. Charlestown*, 11 Id. 161. But for all illegal and malicious acts, by which injury is caused, a municipal corporation is liable: *Goodloe v. Cincinnati*, 22 Id. 764; *Baumgard v. Mayor*, 29 Id. 437. The principal case was followed in *McComb v. Town Council of Akron*, 15 Ohio, 474; S. C., 18 Id. 229; and cited approvingly in *Crawford v. Village of Delaware*, 7 Ohio St. 464. In *City of Dayton v. Pease*, 4 Id. 94, Ranney, J., seems to doubt the doctrine of the principal case, but does not enter into a discussion of it, as in the case he was considering the city was sued for negligence and unskillfulness. In *Western College v. City of Cleveland*, 12 Id. 377, a municipal corporation was sued by a medical college for injuries done it by a riotous assembly, and based the city's liability upon its act of incorporation, which provided, among other things, that it should be the city's duty to prevent disturbances and disorderly assemblages. The court approved of the doctrine of the principal case (at page 378), but distinguished its doctrine from the case under consideration, saying: "It is obvious that there is a distinction between those powers delegated to municipal corporations to preserve the peace and protect persons and property, whether to be exercised by legislation or the appointment of proper officers, and those powers and privileges which are to be exercised for the improvement of the territory comprised within the limits of the corporation, and its adaptation to the purposes of residence or business. As to the first, the municipal corporation represents the state—discharging duties incumbent on the state; as to the second, the municipal corporation represents the pecuniary and proprietary interests of individuals. As to the first, responsibility for acts done, or omitted, is governed by the same rule of responsibility which applies to like delegations of power; as to the second, the rules which govern the responsibility of individuals are properly applicable." The court held the action could not be sustained. This distinction was recognized and followed in *Wheeler v. City*

of Cincinnati, 19 Ohio St. 19, where the court cites *Western College v. City of Cleveland*.

In *Cincinnati v. Pease*, 21 Ohio St. 505, the court approved of the principal case, but distinguished it from that case, as there injury happened to a building abutting on the street, holding that in such a case the owner could not recover for the injuries.

SWIFT v. HOLDRIDGE.

[10 OHIO, 280.]

BONA FIDE PURCHASER FROM FRAUDULENT VENDEE gets a good title, unaffected by the fraud.

VENDEE IN CONVEYANCE TO DEFRAUD CREDITORS IS TRUSTEE for the latter while the property remains in his hands; upon a conveyance by him, the trust ceases.

BILL in chancery from Ashtabula county. The opinion states the case.

Wade and Whittlesey, for the plaintiffs.

Newton and Bailey, for the defendants.

LANE, C. J. This is a creditor's bill, to discover and set aside fraudulent conveyances, and procure the satisfaction of judgments which the plaintiffs have recovered, by subjecting property, real and personal, to execution, or to obtain an account of moneys and assets, in the hands of fraudulent alienees. The papers in the case have become voluminous, and it will hereafter deserve an extended and patient investigation. It was reserved, not to make this examination at this time, but to decide the general principles in relation to the liabilities to creditors of a fraudulent holder of another's property. The bill charges Holdridge with having conveyed his property to Bailey, for the purpose of placing it beyond the reach of his creditors, and that Bailey has sold the land to others. We do not undertake, at this time, to determine definitely the facts of the case, but to adjudicate upon the questions intended to be reserved, we assume for present purposes, that Bailey received a conveyance of this property to defraud the creditors of Holdridge, and that he has sold it to innocent purchasers, for a valuable consideration without notice.

It has been so often held, in the courts of this state, that a fraudulent alienee may make a good title to an innocent purchaser, that we take that point for granted, without discussion. It is claimed, however, by the plaintiff, that the recipient of a fraudulent title becomes a trustee of creditors, and is not per-

mitted to lay down the responsibility, which the law fastens upon him, without justly accounting with the lawful creditors for whom he holds the estate; that whatever may have become of the property, the *cestui que trust* may demand its value from him, if he has placed it beyond the reach of the law. But in our opinion, this proposition is too broad, to be adopted in this general form. Although where one man combines with another to cheat a third, an action at law may be sustained and damages recovered, the jurisdiction of chancery in frauds does not extend so far as to a mere case for damages. The chancellor, under this general power, in cases of fraud, acts only to remove some legal obstacle, or to pursue a fund, or to restore a right lost at law, but not to give mere damages. It is not, then, upon this ground, that a court of equity will entertain jurisdiction against the recipient of a fraudulent title.

An honest man will not take a fraudulent conveyance. If a man hold property fraudulently conveyed, as soon as he comes to a sense of his moral duty, he will restore it to those to whom it belongs: he ought to give it back to him from whom he received it, that it may be applied to his debts, if wanted, or to his benefit, if not necessary for this purpose. The law to discourage frauds, does not compel him to restore it to the fraudulent grantor; yet no man will retain it for a moment, who desires the reputation of honesty, or possesses the sense of justice. The relations between him and the creditors of the debtor are different. There are no express obligations between them; no promise to be accountable to them; no obligation to restore to them; but the creditor ought to receive his debt, and the law gives him a claim to the property, and it charges the fraudulent holder as a trustee, in consequence of his possession. The trust is not express—created by contract; but it arises by operation of law, in consequence of his having in his hands, that which ought to be applied to the satisfaction of the creditor's debt. It depends, therefore, on the possession of the property. The character of *cestui que trust* does not belong to the general creditor, until he has shown himself entitled to the debtor's property, by the recovery of a judgment. And if the fraudulent holder has in good faith divested himself of that, which he could not retain without dishonesty, before the right of the creditor has accrued, there is nothing remaining upon which to raise a trust, and the relation of trustee to anybody subsists no longer.

The court will lend to the judgment creditor any aid in their

power, to reach the property of his debtor in the hands of his fraudulent alienee, or to subject any debts, securities, rights, equities, or choses in action within his power, and will exact a rigorous account of the disposition of anything he may have fraudulently received; but if he has honestly parted with what he fraudulently received, before the rights of the creditor are fixed by judgment and the filing of his bill, he must be exonerated from further liability. How far such taker may incur liabilities, in a suit at law, for a fraudulent combination, we need not now decide.

BONA FIDE PURCHASERS, WHO ARE; AND TITLE OF, HOW FAR PROTECTED.—For a full discussion of this subject, see note to *Williams v. Merle*, 25 Am. Dec. 605, also *Price v. Junkin*, 23 Id. 685; *Root v. French*, Id. 482; *Fetterman v. Murphy*, Id. 729; *Brush v. Scribner*, 29 Id. 303; *Van Rensselaer v. Clark*, 31 Id. 280; *L'Amoureux v. Vandenburg*, 32 Id. 635; *Saltus v. Everett*, Id. 541; *Hoffman v. Stroecker*, Id. 740; *Wineland v. Coonce*, Id. 320; *Clark v. Flint*, 33 Id. 733.

PERSONS ACQUIRING TITLE BY FRAUD ARE TRUSTEES for the injured party: *Coleman v. Cocke*, 18 Am. Dec. 757. The position taken in the principal case, as to the relation between a fraudulent vendee and creditors of the vendor, is approved in *Webb v. Brown*, 3 Ohio St. 284; *Hallowell v. Baylies*, 10 Id. 543; *White v. Brocas*, 14 Id. 341; *Starr v. Wright*, 20 Id. 107.

CARR v. WILLIAMS.

[10 OHIO, 205.]

DEED OF FEME-COVERT NOT EXECUTED ACCORDING TO STATUTE can not be regarded as an agreement to convey, the specific performance of which will be decreed against her.

MISTAKE IN MARRIED WOMAN'S DEED WILL NOT BE CORRECTED as against her.

THOMAS KITCHEN devised the property in dispute to his wife for life, with remainder over to his daughter, Mary, in fee. Mary married Williams, and before the life estate terminated, they conveyed the estate to the complainant, by means of a common printed blank, filled up in the usual manner, except that in the premises the names of the grantors were omitted. The deed was duly executed and acknowledged by Williams and his wife. Complainant filed this bill to correct this alleged mistake of the scrivener in omitting the grantors' names, and prayed further that possession might be decreed him.

Wright and Walker, for the complainant.

C. Fox, for the defendants.

GRANKE, J. A deed which is intended to convey the legal estate, but which is so imperfectly executed, as to fail of effecting that object, is deprived of the character of a conveyance, but may be treated as an agreement to convey, and a resort may be had to chancery for the purpose of enforcing it, and compelling a specific performance; or a bill may be filed for the purpose of rectifying the mistake, when the original deed, as reformed, will take the place of the conveyance, which would otherwise be decreed by the court. In either case, however, the complainant has only an equity, and is obliged, on this account, to go from a court of law to a court of chancery. This is the general principle: but the question now intended to be presented is one of more particularity. It is whether the deed of a *feme-covert*, not executed according to the statute, may be regarded as an agreement to convey, the specific performance of which will be decreed against her, or whether a deed so imperfect may be rectified so as to bind her right. It is familiar to us all, that by the common law, a *feme-covert* could not, by uniting with her husband in a conveyance, bar herself of any estate of which she was seised in her own right. It is immaterial whether the disability is regarded as having its reason on the principle that the separate legal existence of the wife is suspended during the marriage, or in the fact that the influence of the husband may be improperly exerted for the purpose of inducing the wife to part with her interest in his favor. The rule itself is one of undisputed authority.

Our statute prescribes the mode in which a married woman may execute a conveyance of her land. It directs that she and her husband shall join in the conveyance, and if this provision is not complied with, then the deed stands as it would at common law, absolutely void and inoperative as to her, and if a deed, the body of which was defective, was still to be treated as an agreement to convey, or as an imperfect conveyance, other provisions of the statute equally essential would be disregarded. The acknowledgment and separate examination would not be to such an instrument as the law contemplates. I believe no case can be found where a mistake in the deed of a married woman has been rectified as against her; *McCall v. McCall*, 3 Day, 402, is the only one which has been referred to. But it is very different from the present. The deed there was made by the husband alone of his own land, and it is admitted by the counsel for the widow, that by the law of Connecticut, a husband might, by his deed, deprive his wife of her dower. The decision which was made,

however, is hardly reconcilable with the general principles of the law. It appears that two deeds were made by the grantor to two of his sons, Roger and Walter. After he had executed them, he altered his mind as to the dispositions which he had made of his property, and intending to give the land which he had conveyed to Walter, to his son Roger, and the tract which he had given to Roger, to his son Walter, he altered the deeds so as to correspond with this intention, but there was no new execution and acknowledgment of these deeds. Notwithstanding the whole subject-matter of the conveyance was thus effectually altered, the court regarded the instrument, not merely as an executory contract, but as a *quasi* conveyance; and yet, holding that it only transferred the equitable interest of the husband, decreed that it should be reformed, and the widow barred of her dower.

In the case of *Martin v. Dwelly*, 6 Wend. 9 [21 Am. Dec. 245], the deed was made by husband and wife, but was not acknowledged by her pursuant to the statute. The deed was considered as having no more effect than an agreement, and it was held that a court of chancery would not afford relief against the married woman or her heirs. It was conceded that the deed was inoperative at law, but it was contended that it might be treated as a valid contract to convey, performance of which would be decreed against the wife. But this doctrine was declared to be unsound in principle and unsupported by authority. *Baker v. Child*, 2 Vern. 61, has been said to be the only case which contains an intimation that a married woman will be decreed specifically to execute an agreement made during coverture, but in fact no decree was ever made in that case: what appears to be such was the result of an arbitration to which the parties themselves consented. The case of *Butler and Atwater v. Buckingham*, 5 Conn. 492,¹ is an affirmation substantially of the general doctrine which is to be collected from all the books. It was there held that an agreement of a married woman, with the consent of her husband, for the sale of her real estate, was absolutely void at law, and could not be enforced in equity.

But there is another view of the case which has been taken by the complainant's counsel. Considering the omission of the names of the grantors in the granting clause of the deed as a mere clerical error, it is contended that the conveyance is in truth not defective, and that yet the complainant is entitled to the interference of a court of equity. But if this is the effect

1. 5 Day, 492; S. C., 5 Am. Dec. 174.

of the omission where the deed is signed and sealed by the husband and wife, and in all other respects executed according to law, then the complainant has a valid legal title, and his remedy at law is perfect. And if the deed were produced, so that that fact could be certainly and distinctly ascertained, we should probably have no hesitation in so deciding. Either the conveyance is defective or it is not. In the first case, the mistake can not be corrected as against a married woman; in the second, there is no defect to be rectified, and in either event the bill must be dismissed.

Bill dismissed.

THE CERTIFICATE OF ACKNOWLEDGMENT of a married woman's deed must show a substantial compliance with the requirements of the statute: *Watson's Lessee v. Bailey*, 2 Am. Dec. 462; *Evans v. Commonwealth*, 8 Id. 711; *Watson v. Mercer*, 9 Id. 411; a strict adherence is not necessary, a substantial compliance being sufficient: *Hollingsworth v. McDonald*, 3 Id. 545; *McIntire v. Warl*, 6 Id. 417. A voluntary execution must be shown: *Watson's Lessee v. Bailey*, 2 Id. 462; *Evans v. Commonwealth*, 8 Id. 711; *Watson v. Mercer*, 9 Id. 411. And a deed of a *feme-covert* is void unless executed in the mode prescribed by statute: *Martin v. Dwelly*, 21 Id. 245; *Barnett v. Shackelford*, 22 Id. 100; *Payne v. Parker*, 25 Id. 221. The principal case has been cited as authority for the position that a married woman's deed must fully comply with the statutory requisitions, in *Silliman v. Cummings*, 13 Ohio St. 118; and *Chestnut v. Shane's Lessee*, 16 Ohio, 632.

CORRECTION OF DEFECTIVELY EXECUTED INSTRUMENTS OF MARRIED WOMEN.—For a discussion of this subject see the note to *Tiernan v. Poor*, 19 Am. Dec. 230. The principal case is referred to approvingly on the point that a deed can not be corrected as against a married woman, in *Purcell v. Goshorn*, 17 Ohio, 124; *Davenport v. Sovil*, 6 Ohio St. 466; *Goshorn v. Purcell*, 11 Id. 650.

FOOTE v. BURNET.

[10 OHIO, 517.]

COVENANT AGAINST INCUMBRANCES IS A REAL COVENANT running with the land.

MEASURE OF DAMAGES FOR BREACH OF COVENANT AGAINST INCUMBRANCES is the amount paid to remove the incumbrances, with interest, provided the same does not exceed the purchase money and interest; but in no case can the damages exceed the latter sum.

ON March 5, 1817, one Ely mortgaged to Spencer, Burnet, and Corry the premises in question. The mortgage was attested by but one witness and was recorded the fifteenth of the same month. The mortgage was foreclosed and sold to the mortgagees Burnet and Corry, in 1824. They, in 1825, sold the lot with the usual covenants of seisin, against incumbrancers, etc.,

to J. P. Foote, and he in 1826 sold the same lot with the same covenants to the plaintiff S. E. Foote. Ely on March 8, 1817, mortgaged the same premises to Williams and others; the mortgage was foreclosed and sold to them, and they brought ejectment against the tenants of Foote, and, obtaining judgment by default, were put in possession. Foote then brought ejectment against Williams to recover back the premises, but the action was decided in favor of Williams; the court holding that Foote's title was defective, as there was but one witness to the mortgage deed from Ely to Spencer, Burnet, and Corry. Foote then instituted a suit in chancery against Williams, the result of which was that Foote was allowed to redeem upon payment of one thousand seven hundred and seventy-three dollars and ninety-five cents, a sum which exceeded his original purchase price by several hundred dollars. He then instituted this suit against Burnet, alleging a breach of all the covenants in the deed to him from Burnet and Corry.

W. B. Morris, for the plaintiff.

V. Worthington, for the defendant.

HITCHCOCK, J. In the consideration of this case, we have been led to inquire, whether the title of the plaintiff was defeated by a paramount legal right, or whether the mortgage from Ely to Williams and others was a mere incumbrance upon the land, which the plaintiff might remove by payment, and look to his covenantors for indemnity. If the former, then the plaintiff is entitled to recover upon his covenant of warranty, and in such case, the law is well settled in this state, that the rule of damages is the consideration money paid and interest. At least such would be the rule where the whole land was lost to a purchaser, by a paramount title. If but a part is lost, the damages must be commensurate with this loss, estimating the same according to the consideration actually paid. In the suit in chancery between Foote and Williams, determined in 1834, this court seem to have considered the claim of Williams not as a paramount legal title, but as an incumbrance upon the land which might be removed by the present plaintiff, and decreed accordingly. In pursuance of this decree, this incumbrance was removed by the plaintiff, and he now seeks to recover the amount paid to remove it, under the covenant in his deed against incumbrances.

This claim is resisted by the defendant's counsel, upon the ground that the covenant against incumbrances in the deed from Burnet and Corry to John P. Foote was a personal covenant, that

it was broken as soon as made, if broken at all, and did not pass with the land to the present plaintiff. That the covenant of seisin has been generally, by courts, considered as a personal covenant, and not running with the land, is fully shown by the authorities cited. And in this respect the covenant against incumbrances is not dissimilar to that of seisin. So far as it respects this latter covenant, the question, whether it is a real or personal covenant, was before this court in the case of *Backus v. McCoy*, 3 Ohio, 211 [17 Am. Dec. 585]. Many of the authorities which are now cited, were then examined by the court, and the case fully considered. After much deliberation, it was decided that the covenant of seisin in a deed, when the covenantor is in possession claiming title, is a real covenant running with the land. But where the covenantor is not in possession, and the title is defective, it is broken as soon as made, and never attaches to the land, being in the nature of a personal covenant. It is true, the plaintiff's counsel questions the authority of this case, and claims, that it is unsustained by authority. It is admitted that there are authorities against the decision, and it is clear that there are authorities which go to sustain it. But if there were no such authorities, still we shall be disposed to abide by it so long as we believe it to be in accordance with the immutable principles of right and justice.

The same train of reasoning which led the court to this decision, will lean to a similar result with respect to the covenant against incumbrances. This covenant, like "the covenant of seisin, is made for the benefit of the grantee, in respect to the land. It is not understood as a contract, in which the immediate parties are alone interested, but as intended for the security of all subsequent grantees." If the first grantee continues in possession of the land, while his title remains undisturbed, and conveys to a subsequent grantee, in whose time an outstanding incumbrance is enforced against the land, justice requires that this subsequent grantee should have the benefit of the covenant against incumbrances, to indemnify himself. We hold, therefore, in accordance with the decision in the case of *Backus v. McCoy*, that a covenant against incumbrances is a covenant running with the land, until the incumbrances are removed. And, therefore, that the plaintiff is entitled, in this case, to recover for the breach of such covenant.

The next question is as to the measure of damages, and upon this question, we have had much difficulty. It is said in the books, that the covenant against incumbrances is a contract of

indemnity, and hence it is argued that the covenantee may recover to the extent of the amount he has paid to extinguish the incumbrance. If this be correct, then, upon this covenant, a recovery to a much greater amount may be had than upon the covenant of warranty which is ever considered the principal covenant in a deed. In the case before us, the consideration money paid to Burnet and Corry for the land, was ten hundred and twenty dollars. If the plaintiff had entirely lost the land by paramount title, all he could have recovered would have been this sum, together with interest. But he has not been deprived entirely of the land. He has paid off an incumbrance amounting to one thousand seven hundred and seventy-three dollars and ninety-five cents. If, in the present action, he can recover this amount with interest, he recovers more than he would have done, had he entirely lost the land. There would seem to be some inconsistency in this.

That in an action for the breach of a covenant against incumbrances, the measure of damage is the amount paid in good faith to remove such incumbrances, is sustained by the following authorities: *Delavergne v. Norris*, 7 Johns. 458 [5 Am. Dec. 281]; *Hall v. Dean*, 13 Id. 105; *Leffinwell v. Elliott*, 10 Pick. 204; *Brooks v. Moody*, 20 Id. 474; *Prescott v. Truman*, 4 Mass. 627 [3 Am. Dec. 246]. Many other cases might be cited to the same point, but it is unnecessary as they are referred to in the argument of counsel. But in none of these cases does it appear, that the amount paid to remove incumbrances, exceeded the amount of consideration money paid for the land.

Chancellor Kent, in his commentaries, 4 Kent's Com. 476, 2d ed., says: "If the subsisting incumbrances absorb the value of the land, and the quiet enjoyment be disturbed by eviction by paramount title, the measure of damages is the same as under the covenants of seisin and warranty. The uniform rule is, to allow the consideration money, with interest and cost, and no more. The ultimate extent of the vendor's responsibility, under all or any of the usual covenants of his deed, is the purchase money with interest."

In seeking for adjudged cases, we have found but one analogous to the case before us, and that is the case of *Dumrick v. Lockwood*,¹ 10 Wend. 142. In that case, the consideration paid was one hundred and twenty-five dollars, and the enhanced value by reason of improvements, was one thousand dollars. A moiety of the premises had been sold by virtue of a pre-existing

1. *Dumrick v. Lockwood*.

judgment against the grantor. The action was for a breach of the covenant against incumbrances. The court held that the grantee was entitled to recover only the consideration of the purchase of the portion lost, with interest and costs, and not the enhanced value in consequence of improvements. In giving the opinion of the court, Chief Justice Savage, after reviewing all the authorities, in closing says: "Among all the cases which have been cited, there is none in our court, where the purchaser has been permitted to recover, beyond the consideration money and interest and costs. There is none in Massachusetts, where, under the covenant against incumbrances, the purchaser has recovered any more, though there the rule allows a recovery for the value at the time of eviction. All the reasoning of our judges goes to limit the responsibility of the grantor, to the consideration, with interest and cost, and I am unwilling to go further, where the principle to be established may lead to greater injustice.

After full consideration, and careful examination, we have been led to the conclusion, that the law is, as laid down in this case. That the true measure of damages, in an action for the breach of the covenant against incumbrances, is the amount paid to remove the incumbrance, with interest, provided the same do not exceed the purchase money and interest. But in no case can a purchaser recover greater damages for the breach of any of the ordinary covenants in his deed, than for a breach of the covenant of warranty.

Judgment will be entered in favor of the plaintiff, computing the damage upon this principle.

Judgment for the plaintiff.

WHAT COVENANTS RUN WITH THE LAND: See *King v. Kerr's Adm'rs*, 22 Am. Dec. 777; *Suydam v. Jones*, 25 Id. 552; *Lot v. Thomas*, 2 Id. 354; *Backus v. McCoy*, 17 Id. 585; *Pollard v. Shaffer*, 1 Id. 239; note to *Fulton v. Stuart*, 15 Id. 544; *Kellogg v. Robinson*, 27 Id. 550; *Watertown v. Cowen*, Id. 80. In the note to *Crouch v. Fowle*, 32 Id. 353, the doctrine of implied covenants of title is discussed at length.

MEASURE OF DAMAGES FOR BREACH OF COVENANTS.—Of covenant of warranty, see *Hanson v. Buckner*, 29 Am. Dec. 401; *King v. Kerr*, 22 Id. 777; *Horsford v. Wright*, 1 Id. 8. Of covenants of seisin, see *Horsford v. Wright*, Id. 8; *Gilbert v. Bulkley*, 13 Id. 57, and note 59. Of covenant against incumbrances, see *Delavergne v. Norris*, 5 Id. 231; *Funk v. Voncida*, 14 Id. 617. Of covenant to stand seised: *Singleton v. Bremar*, 17 Id. 699. Of covenant to convey, see note to *Bakhtoin v. Munn*, 20 Id. 632. The principal case has been cited to the following points: That in no case can the damages for a breach of covenants against incumbrances exceed the amount of the consideration money, in *Nyce v. Oberts*, 17 Ohio, 76; that the measure of dam-

ages in a covenant of warranty is the amount paid to extinguish the incumbrance, provided it does not exceed the purchase price, in *Bricker v. Bricker*, 11 Ohio St. 244; that proportional damages will be allowed where there is an eviction from a part of the premises: *McAlpin v. Woodruff*, Id. 129.

LINN v. ROSS.

[10 OHIO, 412.]

TENANT'S LIABILITY FOR RENT, WHEN PREMISES ARE DESTROYED.—Where tenant leases certain property for a specified time, and in the contract agrees to pay a certain sum yearly for rent, and makes no reservation on account of accidents, his contract to pay rent is express, and he is liable therefor, though the premises are destroyed before the expiration of the time.

Assumpsit from Clark county, to recover the rent of certain premises leased to the defendants. The contract of lease is as follows:

"I, Joseph M. Linn, have leased and let to O. E. Ross & Co., the west division of my new building, in the town of Springfield, for two years from the first day of September, 1839, for three hundred dollars per annum, payable quarter-yearly.

"J. M. LINN,

"E. C. Ross & Co."

The defendants pleaded the general issue, and gave notice that they would show that they had paid the rents up to February 14, 1840; that on the tenth of February, 1840, the leased premises were destroyed by fire without any negligence on their part; that on the fifteenth of February they surrendered the unexpired portion of the lease to the plaintiffs, who accepted the surrender, and entered into the exclusive possession of the premises. The jury found a verdict for the plaintiff for the rent accruing after the destruction, the amount claimed. The defendants moved for a new trial on account of an alleged misinstruction by the court. The instruction appears from the opinion.

W. A. Rogers, for the plaintiff.

Mason and Torbert, for the defendants.

Wood, J. It appears from the record that the court charged the jury, "that the agreement on which the action was brought was an express contract for the payment of rent quarterly for the use and occupation of the building leased, and being express, the defendants were not released from their obligation by the destruction of the building by fire, on the fourteenth of

February, 1840, though without the fault of the defendants." This instruction of the court is supposed to be erroneous, and our investigation is resolved into the inquiry, whether the agreement to pay the rent, which is the basis of the action, is express or implied. For if it be express, whether under seal or by parol, whether the action be covenant or assumpsit, the destruction of the leased premises, by inevitable accident, does not discharge the lessees from their liability to pay the rent. This is admitted by the defendant's counsel, and it would be difficult to maintain the affirmative of the proposition against the weight of authority contained in both the English and American reports: 3 Kent's Com. 373.

Is this then an express contract to pay the rent? An express contract may be defined to be an agreement whose terms are openly uttered or expressed by the contracting parties. In such a case, if the contracting party by his own act creates a charge upon himself, he is held to its performance, and inevitable accident does not excuse him, for it was his own folly, that he did not provide against it in his contract. An implied agreement is where the terms of the contract are not expressed between the contracting parties, but the obligations of natural justice, by reason of some legal liability, impose the payment of money or the performance of some duty, and raise a promise to that effect. In the latter case, as the law creates the duty, it also provides the exception, for if the party be disabled from performance without his own default, his obligation is discharged.

Is this contract, then, express or implied? It is signed by both the parties. It expresses the description of the premises leased, the time for which they are to be engaged, and the consideration, in these words: "For three hundred dollars per annum, payable quarter-yearly." Nothing is left here to inference, all is agreed by the parties themselves. The defendants have leased the store for two years, and agreed to pay the rent, three hundred dollars, quarter-yearly, and as they did not provide in their contract against inevitable accident, they are not discharged by the destruction of the store, though without their default.

The instruction to the jury was right, and judgment will be entered on the verdict.

Verdict for the plaintiff.

DESTRUCTION OF LEASED PREMISES BY FIRE does not release lessee from his liability for rent: *Gates v. Green*, 27 Am. Dec. 68, and note 71.

PERKINS' LESSEE v. DIBBLE.

[10 OHIO, 433.]

FORM OF SHERIFF'S DEED.—A sheriff's deed is sufficient if it shows that the officer had authority to sell; therefore where the deed recites the execution, and the names of the parties as therein stated, it is sufficient, though in referring to the judgment it does not again recite the names nor state the amount of the judgment except as it appears upon the execution.

DEED WITH CONDITION OF DEFEASANCE UPON THE BACK is but a security for money, and therefore only a mortgage; and whether the condition preceded or followed the signature, does not affect its nature.

WHERE CONDITION IS NOT COMPLIED WITH AT TIME STIPULATED, but is performed afterwards, the land reverts in the grantor without the necessity of a reconveyance.

TO VALIDATE TAX SALE, LAND MUST BE PROPERLY ENTERED ON tax duplicate.

TAX DUPLICATE INSUFFICIENT, WHEN.—A tax duplicate describing the land as being in "range 3, township 13, section 1, lots 8 and 9 N. part, one hundred acres," without specifying the quantity of land in each lot, is not sufficient under the act of February 3, 1835, and a tax sale under it is void.

EJECTMENT from Ashtabula county. Plaintiff proved that, on June 25, 1816, one Doty being in possession of the land in controversy, conveyed it to A. Harman, who deeded it, on August 29, 1817, to Judith Yeomans. In 1819, Doty and Judith Yeomans intermarried, and remained in the possession of the land until November, 1836, when it was sold on execution, at the suit of A. Harman, to Simon Perkins, the lessor of the plaintiff. The admission of the sheriff's deed in evidence was objected to on the ground that it did not sufficiently state the cause of action, the names of the parties, etc.; but the objection was overruled and the deed admitted. The defendant offered in evidence a deed of the same premises from Doty to one Nathan Strong, dated December 5, 1815; on the back of this deed, a condition or defeasance was indorsed, stipulating that the deed would be void on the payment by Doty of one hundred and twenty dollars by December 5, 1816. He also offered a deed from the auditor of Ashtabula county to Strong, dated September 17, 1830, conveying the land on a sale for taxes. In support of the tax sale, defendant offered evidence of the auditor's tax duplicate, and the proceedings and sale thereunder. The entry of the land upon the duplicate is as follows: "Range 3, township 13, section 1, lots 8 and 9 N. part, one hundred acres. This deed was objected to, but was admitted subject to the objection. There was also produced a deed from Strong to one Osborn and from

Osborn to the defendant. The defendant also proved that the debt mentioned in the defeasance was not fully satisfied till 1828.

Giddings and Chaffee, for the plaintiff.

H. Wilder, for the defendant.

HITCHCOCK, J. There is no controversy about the facts in this case. Although not placed before the court in the shape of an agreed statement, still there is no contradiction in the testimony. The facts are fully set forth in the statement of the case, and the questions thereon will be considered in the order in which they naturally arise.

The only defect in the plaintiff's proof as making a *prima facie* case, is supposed to be in the sheriff's deed of November 22, 1836. This deed is objected to on two grounds: 1. That there was no evidence given of a judgment or levy; and 2. That it does not contain the necessary recitals. As to the first objection, it would have been fatal had it been taken at the time of trial on the circuit. If, however, it had then been made, no doubt the defect of testimony would have been supplied. But the only question then raised was as to the recitals in the deed, and this was the question reserved, and is the only one which can now be considered. The law regulating judgments and executions, requires that the "deed of conveyance to be made by the sheriff or other officer, shall recite the execution, or the substance thereof, and the names of the parties, the kind of action, the amount and date of term of the rendition of each judgment, by virtue whereof said lands and tenements were sold," etc. The deed in the present case recites the execution, and the names of the parties as therein stated, but in referring to the judgment does not again recite their names, neither does it state the amount of the judgment, except as it appears upon the execution. It recites sufficient to show that the officer had authority to sell, and this we hold to be all that is necessary, although in every instance it would be well for a sheriff or other officer to follow literally the provisions of the statute. So far as the statute makes provision for any recitals beyond what is necessary to show an authority to sell, we consider it as directory merely, and it was so decided in the case of *Armstrong v. McCoy*, 8 Ohio, 128 [31 Am. Dec. 435]. Such being the opinion of the court, the objection to the sheriff's deed is overruled, and this deed, in connection with the previous evidence, makes a *prima facie* case for the plaintiff. The defendant, to rebut this case made by the plaintiff, relies: 1. Upon the deed made by

Doty to Strong in 1815; 2. Upon the tax sale of 1827, and the deed made in pursuance thereof in 1830. Whether the defendant has connected himself with the title derived from these deeds is immaterial. If the deed of 1815 divested Doty of all legal title to the land, or if he was divested of title by the sale for taxes, and the deed made pursuant thereto, the plaintiff must fail, for he clearly has no title, and the rule in ejectment is inflexible, that a plaintiff must recover upon the strength of his own title, not upon the weakness of that of his adversary.

What then was the nature of the deed of 1815? Upon its face it purported to be an absolute deed of conveyance of the land in controversy. But upon its back it contained the following condition: "Provided nevertheless, if the said Ebenezer Doty, his heirs, executors, or administrators shall well and truly pay to the said Nathan Strong, his heirs, executors, or administrators, a certain note of hand dated the fifth day of December, 1815, for the sum of one hundred and twenty dollars, payable by the fifth day of December, 1816, with interest; now know ye, that if the said Ebenezer Doty shall well and truly pay or cause to be paid, the sum of one hundred and twenty dollars with interest thereon according to the above and within statement, then this deed is to be null and void, otherwise to be in full force in law." Had this condition preceded the signature and acknowledgment of the deed, that instrument would have been a mortgage. But it is urged by defendant's counsel, that as it follows the signature it is no part of the deed, and the instrument can not be considered in law as a mortgage, however it might be in equity. The court however entertain the opinion that the legal effect of this deed is the same as if the matter placed upon it and following the signature had preceded the signature. It shows the purpose for which the deed was delivered, and that purpose was as collateral security for the payment of money. And every deed made for such purpose is a mortgage.

Before foreclosure or entry under a mortgage, the mortgagor must be considered as the owner of the land. And it has been repeatedly decided in this court that the interest of the mortgagor may be sold on execution, the purchaser taking the land subject to the mortgage. In the case of *Jackson v. Willard*, 4 Johns. 41, the supreme court of New York held that before foreclosure, although the estate had become absolute at law, the mortgaged premises could not be sold on execution against the mortgagee. And in the case of *Hitchcock and Wife v. Harring-*

ton, 6 Id. 290 [5 Am. Dec. 229], the same court decided, that the mortgagor, notwithstanding the mortgage, is deemed seised and is the legal owner of the land as to all persons except the mortgagee and his legal representatives. If the condition of the mortgage be complied with, by the payment of the debt secured on the day, an absolute estate never vests in the mortgagee. And even if the mortgagee have taken possession, the mortgagor, upon payment being made according to the condition, or upon tender of such payment, may re-enter. He is reinvested with the full legal title: 2 Preston on Conveyances, 200, 201; 4 Kent's Com. 193; Bac. Abr. 20, 21; Co. Lit. 209.

But whether after a default of payment, whereby the estate becomes absolute in the mortgagee, and the mortgage is subsequently paid off and satisfied, the estate can revert at law to the mortgagor without a reconveyance, is a question of more difficulty. And the question has been decided differently in different states. The ancient doctrine undoubtedly was, that under such circumstances, a reconveyance was necessary. And such would seem to be the law in Massachusetts, Connecticut, Virginia, and Kentucky: 8 Mass. 554; 15 Id. 238; 17 Id. 419; 1 Day, 151; 4 Rand. 225; 2 Munt. 337.¹ But in New York and Maryland, it has been held that no such reconveyance is necessary: 18 Johns. 7; 5 Cow. 202; 2 Har. & M. 17; 8 Id. 399.² And in the case of *Gray v. Jenks*, 8 Mason, 520, it was held that a satisfied mortgage was so far an extinguished title, that no action would lie upon it in favor of the mortgagee. If we look at the true nature of the contract, and view the mortgage as it really is, a mere security for a debt; if the debt is the principal, and the mortgage the incident, there certainly, as it appears to me, can be no good reason why a discharge of the debt should not be held to be a discharge of the mortgage, and put an end to the interest of the mortgagee in the land. Such was said by this court to be the case in *Hill v. West*, 8 Ohio, 222 [31 Am. Dec. 442], and we are disposed to adhere to the opinion therein expressed. We are aware that this is contrary to the old doctrine upon the subject, but we believe it is in conformity with reason and with modern decisions: 4 Kent's Com. 193. Nor does this opinion conflict with the statute of the twenty-second of February, 1831, pointing out the manner in which satisfaction of a mortgage may be entered. If it did, it could make no difference, as the mortgage debt in this case was satis-

1. *Warden v. Adams*.2. *Parsons v. Welles*.3. *Phelps v. Sage*.4. *Faulkner v. Brockenbrough*, 4 Rand. 245.5. *Drummond v. Richards*.6. *Jackson v. Davis*.7. *Morgan v. Davis*.8. *Pasen v. Paul*.

fied long before the enactment of this law. Apply these principles to the case before the court, and it follows that the defendant can not protect himself under the deed of 1815, as that was a deed of mortgage, and the debt secured by it was paid and satisfied long before the commencement of this suit.

The only remaining question is as to the validity of the tax sale of 1827. It is admitted that this sale was legally made, provided the land was properly entered on the tax duplicate. The quantity of land taxed and sold was one hundred acres. It was described as being the north part of lots 7 and 8, section 1, township 13, range 3. The quantity of land in each lot is not specified, and it was sold as an entire tract. The evidence shows that these two lots adjoined each other on the east and west, and there could have been no difficulty in finding the land, had it been conveyed by a similar description in a deed. But although this description might be sufficiently certain in a deed, it does not follow that it is sufficiently certain to sustain a sale for taxes. In order that such sales may be sustained, it is necessary that all the requisitions of the law under which they are made, should have been complied with, and any departure from these requisitions will defeat the sale. Such has been the uniform decision of this court.

The law under which this land was listed for tax, and entered upon the tax duplicate, is the act of the third of February, 1835, entitled "an act establishing an equitable mode of levying the taxes of this state:" Chase's Stats. 1476. The tenth section of the act requires of the county assessor to take a list of all property in his county, subject to taxation, and for this purpose it is made his duty to visit each house in the county, etc. In the eleventh section, the list which is to be taken is prescribed. It "shall particularly set forth the name of the owner or owners, the number of acres of land in each particular tract, lot, section, or subdivision thereof, the range, township, section, quarter section, tract, lot, or part thereof, or the number of entry, location, survey, or watercourse, as the nature of the general or particular surveys may require, so as completely to designate or identify the same." The great object here is to have the list so made as to designate and identify the land, and the different modes of division in the different parts of the state referred to. Whatever that division may be, whether into entries and surveys, or into townships, sections, quarter sections, tracts, or lots, the number of acres in each division, or subdivision, must be separately and "particularly

set forth." If the owner of the land does not furnish a list it is made the duty of the assessor to make it out, and having taken these lists and affixed a value to the property, it is his duty to return an abstract of the same to the county auditor. From this abstract returned, the county auditor was to make out a tax duplicate. That there need be no mistake, the thirty-ninth section of the act prescribes the forms which shall be made use of by the officers whose duties are prescribed in the act. These forms show, that both in the list and in the duplicate, the precise number of acres in each particular tract or lot, or part thereof, must be particularly set forth.

In the case now before us this was not done. The description is one hundred acres in the north part of two lots. It does not show the number of acres in each particular lot," and is not in this respect in conformity with the law. No case precisely like the one now before us has ever been decided by the court, but adopting the principles by which we have been governed in cases somewhat analogous, we must hold that this tax sale was void, and that the deed made in pursuance thereof conveyed no title.

There being nothing to impair the *prima facie* case made by the plaintiff, he is entitled to judgment.

Judgment for the plaintiff.

RECITALS IN SHERIFF'S DEED.—A sheriff's deed is void, if it does not recite the judgment, where the statute requires such recital: *Dufour v. Camfranc*, 13 Am. Dec. 360; but reference to the execution and a recital of its principal parts is a sufficient compliance with the statute: *McGuire v. Kowma*, 18 Id. 187; and a misrecital in the sheriff's deed of facts authorizing his conveyance will not avoid his deed, if the necessary facts actually exist: *Martin v. Wilbourne*, 27 Id. 393. In *Harrison v. Maxwell*, 10 Id. 611, it was held that a recital of the authority under which the sale was made was not indispensably necessary; and that if in such deed the execution is misrecited, as having issued from one court where it in fact issued from another, the misrecital is not fatal. The judgment offered to support a sheriff's deed must appear to be the one recited therein; and a variance of two dollars and seventy-eight cents between the judgment recited and the one produced in evidence, was held to be fatal to the validity of the deed, in *Den v. Despresaux*, 22 Id. 485.

ABSOLUTE DEED WITH AGREEMENT TO RECONVEY.—For a full discussion of the legal effect of such an instrument, see the note to *Chase's case*, 17 Id. 300; also *Friedley v. Hamilton*, Id. 638; *Reading v. Weston*, 18 Id. 89; *Edrington v. Harper*, 20 Id. 145; *Harbison v. Lemon*, 23 Id. 376; *Youle v. Richards*, Id. 722; *Bennet v. Holt*, 24 Id. 455; *Gillis v. Martin*, 25 Id. 729; *Colewell v. Woods*, 27 Id. 345; *Bennock v. Whipple*, 28 Id. 186; *Hickman v. Cantrell*, 30 Id. 396. The principal case was approved on the point that an absolute deed with a condition of defeasance on its back would be construed as a mortgage,

when the instrument was intended merely as a security for money, in *Woodruff v. Robb*, 19 Ohio, 215.

TAX SALES.—This subject is fully discussed in the notes to *Blake v. Howe*, 15 Am. Dec. 684, and *Jackson v. Shephard*, 17 Id. 505; see also *Cox v. Blandin*, 26 Id. 83; *Garrett v. Doe*, 30 Id. 653.

THE PRINCIPAL CASE HAS BEEN CITED to the following points: That no particular form is necessary to constitute a mortgage: *Hurd v. Robinson*, 11 Ohio St. 234; that an objection not taken at the circuit will not be considered in bank: *Lewis v. Bank of Kentucky*, 12 Ohio, 148.

FEE v. FEE.

[10 OHIO, 469.]

STATUTE OF LIMITATIONS BEGINS TO RUN WHEN THE CAUSE OF ACTION ACCRUES, not from the time the knowledge of that fact comes to the plaintiff.

FRAUDULENT CONCEALMENT WILL NOT STOP THE RUNNING OF THE STATUTE, though the plaintiff is thereby prevented from knowing that his cause of action accrued; the relief in such a case would be in equity.

ASSUMPSIT for money had and received. The declaration charges that defendant had and received the money in the intestate's life-time, and had promised to pay the same to the plaintiff as administrator. The defendant pleaded the statute of limitations, and to this plaintiff replied that defendant received the money in the intestate's life-time, and without his knowledge, and fraudulently concealed the same from him; that the intestate did not know of the receipt of the money, nor did the plaintiff, his administrator, know of the receipt of the money till within six years before the commencement of the suit. To this replication there was a demurrer and rejoinder.

Coombe, for the plaintiff.

Nash, for the defendant.

GRIMKE, J. From the statement of the case it is evident that the cause of action accrued on the receipt of the money. In such a case it is not sufficient, in order to avoid the effect of the statute, to aver that the party was ignorant of the fact that he had a cause of action. The plea of the statute goes to the existence of the cause of action, and not to the knowledge of it. This, although it is a sort of elementary principle, and has its foundation in necessity and convenience, has been sometimes questioned, but I am not aware that it has ever been shaken. The case of *Granger v. George*, 5 Barn. & Cress. 149, is one of the last in which the point has been made. It was an action of

trover. The conversion had taken place more than six years before the commencement of the suit. The plaintiff attempted to avoid the bar of the statute by replying that the fact of the conversion did not come to his knowledge till within six years. But it was held notwithstanding that the statute was a bar, and that the circumstances which were set out in the plea were entirely foreign to the issue. The replication in the present case, however, goes further. It attempts to show a fraudulent concealment on the part of the defendant. Can a plea of the statute then be avoided, by replying that the cause of action had been fraudulently concealed by the defendant? This is a question about which there has been a great diversity of opinion. Mr. Chitty, in his late treatise on contracts, page 318, remarks, that it does not appear to be settled whether fraud in the defendant prevents or suspends the operation of the statute. But he confesses that there would be great difficulty at law in setting up even an undiscovered fraud, as an excuse for not commencing an action. Nor has he been able to find a single case where it has been held that it may be done. The great diversity in the cases is to be found in this country, and that is attributable in a great measure to the circumstances that in many of the states there is no court of chancery. Where there is no tribunal to administer equitable relief, a court of law is very apt to adapt its own rules to the system of equity jurisprudence.

I shall not stop to inquire whether the replication in form is sufficient. Chitty, after remarking that it had been suggested that fraud would prevent the running of the statute, says: "At all events, if in assumpsit the statute be pleaded, and fraud undiscovered within six years be relied on, the general replication and the fraud should be specially replied." The determination of the principal question in the case renders it unnecessary to notice this point. One of the earliest American cases in which this doctrine of fraud has been considered, is that of *The Turnpike Co. v. Field*, 3 Mass. 201. It was there held that a fraudulent concealment by the defendant, that a cause of action has accrued to the plaintiff, is a good replication to a plea of the statute of limitations. The replication stated that the defendant fraudulently concealed the bad foundation of a road he had engaged to make, the unsuitable materials, and the unfaithful execution of the work by covering the same with earth, and smoothing the surface, so that it appeared to the plaintiff that the contract had been duly complied with. There is no court

of chancery in Massachusetts, and the only authorities which are referred to, are *The South Sea Co. v. Wymondsell*, 3 P. Wms. 148; and *Bree v. Holbeck*, Doug. 654. The last was a case in a court of law, but the point was not decided. It is only said by way of argument, that there may be cases which fraud will take out of the statute of limitations. The authority of this case has, however, been recognized in *Homer v. Fish*, 1 Pick. 435 [11 Am. Dec. 218]; *Sherwood v. Sutton*, 5 Mason, 143; and *Bishop v. Little*, 8 Greenl. 405.

A totally different view of the law is taken in *Miles v. Berry*, 1 Hill, 296. The principle of the decision which had been made in the previous case of *Harrell v. Kelly*, 2 McCord, 426, is reluctantly admitted, although the two cases are very distinguishable from each other. In the last, fraud constituted the foundation of the action, the suit was brought upon the fraud, but in *Miles v. Berry*, it was on the note. The evidence showed that the defendant had fraudulently obtained possession of it, and concealed that fact till the statute of limitations had run out. In reply to a plea of the statute, it was contended that this fraudulent conduct prevented the running of the statute. But the court, true to the principles which are administered in a court of law, held otherwise. It was said that if the plaintiff's action was predicated upon the defendant's fraud, as in action on the case for fraudulently obtaining possession of a note, or an action of trover for its recovery, it might then be urged that the statute would not run. Admitting that this distinction is well founded between those actions which are founded upon the fraud and those which are not, though I confess I am by no means satisfied with it, the authority of *Harrell v. Kelly* will still stand, while *Miles v. Berry* is a direct and decisive determination against the validity of the replication in the present case. In South Carolina there is a court of chancery, and as I before remarked, the decisions in the different states vary very much according to the constitution of their tribunals.

Callis v. Waddy, 2 Munf. 511, and *Cook v. Darby*, Id. 444,¹ enforced the same doctrine. The last was an action against a common carrier for fraudulently taking articles from the packages intrusted to him to carry. To a plea of the statute, it was replied that the plaintiff had no knowledge of the fraud till within the time limited, but the court held the action barred. In this case, too, it must be remembered the action was founded upon the fraud. This case then goes further than

1. 4 Munf. 444; S. C., 6 Am. Dec. 529.

that of *Miles v. Berry*, though not further, I am convinced, than the courts of South Carolina would go if the case of *Harrel v. Kelly* were not in the way. Virginia, however, as well as South Carolina, had a court of chancery, at least when these two cases in Munford were decided. On the other hand, in *Jones v. Conway*, 4 Yeates, 109, and in 12 Serg. & R. 128,¹ the courts of that state appear to be disposed to administer equitable relief.

The most luminous and best considered case to be found in all the books, is undoubtedly that of *Troup v. Smith*, 20 Johns. 33. It was there held, in an action of assumpsit, for negligence and unfaithfulness in the performance of work, that the plaintiff, in answer to a plea of the statute, can not reply a fraudulent concealment of the badness of the work, in consequence of which the plaintiff did not discover the fraud until within six years. The distinction between the proper jurisdiction of courts of chancery and courts of law, was stated and unanswerably enforced. The reason why a party may avail himself of the fraud in the former courts, is well explained by Lord Redesdale, 2 Sch. & Lef. 634.² Although the statute, he says, does not in terms apply to suits in equity, it has been adopted there in analogy to the rules of law. And the reason which he gives why, if the fraud has been concealed by the one party until it has been discovered by the other, it shall not operate as a bar, is, that the statute ought not in conscience to run, the conscience of the party being so affected that he ought not to be allowed to avail himself of the length of time. But in a court of law, the statute must necessarily receive a strict construction. That court can not introduce an exception to the statute which the legislature have not authorized. In *Evans v. Bicknell*, 6 Ves. 174, Lord Eldon, in noticing the position of some of the common law judges in *Paisley v. Freeman*, that if there was relief in equity there ought to be relief at law, observes, that it was a proposition excessively questionable, and that it could only have been made from not adverting to the constitution and doctrine of a court of chancery. I agree with the opinion in *Troup v. Smith*, that as the statute declares that certain actions shall be commenced within a limited period, the courts of law possess no dispensing power whatever. The law of Ohio, like that of New York, contains a saving in favor of infants, *femes-covert*, non-residents, and persons *non compos*, but it does not make fraud one of the exceptions. The true inquiry, therefore, at law is, when did the cause of action arise? and not, when did

1. *McDowell v. Young*.2. *Hovenden v. Annasley*.

knowledge of that fact come to the plaintiff, or by what circumstances was he prevented from obtaining the information? These are questions which may be properly addressed to a court of chancery, but of which a court of law is bound to have no knowledge. *Troup v. Smith* was also decided in a state which has a court of chancery, and the bounds of the jurisdiction of the other court are therefore preserved.

Whatever may be thought of the propriety of having two tribunals administering a totally different law, yet so long as they exist, every motive of convenience and justice concurs in securing to each its appropriate functions. There may be no other use in this arrangement, than what arises from the great principle of the division of labor, in consequence of which all human exertion, whether it be of the mind or of the body, is sure to be more vigorous and successful. When the rules of equity law were first introduced, they were only scattered exceptions to the general system of jurisprudence. They did not themselves constitute a system. They gained ground only occasionally, and by piecemeal. But at the present day equity law is as regular a scheme of jurisprudence, and proceeds upon rules as completely settled as those which are dispensed by the common law courts. To confound the distinction between the two tribunals now, would be not merely to invade a solitary and occasional exception to a rule, but to overturn a whole system, and for that reason to introduce the greatest injustice into the administration of the laws.

Demurrer sustained.

STATUTE OF LIMITATIONS BEGINS TO RUN when the cause of action accrues, not when a person ignorant of his rights comes to a knowledge of them: *Thomas v. White*, 14 Am. Dec. 56; *Jordan v. Jordan*, 16 Id. 249; *Smith v. Bishop*, 31 Id. 607; but the statute does not run until there is some one in whom the right of action is indubitably vested: *Commonwealth v. McGowan*, 7 Id. 737; *Ruff v. Bull*, 16 Id. 290; *McDonald v. Walton*, 14 Id. 318; and where a demand is necessary the statute does not begin to run until the demand: *Wright v. Hamilton*, 21 Id. 513; *Judah v. Dyott*, 25 Id. 112; *Sherrod v. Woodard*, 25 Id. 714.

HOW FAR FRAUD PREVENTS RUNNING OF STATUTE.—Lapse of time brought about by the improper conduct of a party can not avail him: *App v. Dreisbach*, 21 Am. Dec. 447; *Richardson v. Jones*, 22 Id. 293; *Arnold v. Scott*, Id. 433. And ignorance of fraud prevents the running of the statute: *Shelby v. Shelby*, 5 Id. 686; *Homer v. Fish*, 11 Id. 218; *First Mass. T. Corp. v. Field*, 3 Id. 124. Though in *Reeves v. Dougherty*, 27 Id. 496, it was held that the statute of limitations applied where possession was acquired by fraud. The principal case was followed in *Lathrop v. Snellbaker*, 6 Ohio St. 278, and cited to the effect that fraud does not prevent the running of the statute, in *Houw v. Minnick*, 19 Id. 466.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

WRIGHT v. GUIER.

[9 WATTS, 172.]

OWNER OF LAND OUT OF POSSESSION MAY MAINTAIN TROVER FOR TIMBER cut thereon by one not in actual possession of the premises.

ENCLOSURE AND CULTIVATION ARE NECESSARY TO CONSTITUTE ADVERSE POSSESSION of a tract by one having no color of title, so as to protect him from an action of trover by the real owner for timber cut thereon.

REPEATED TRESPASSES BY CUTTING TIMBER ON UNOCCUPIED WOOD LAND, by the owner and occupant of an adjoining tract, do not constitute such adverse possession as to defeat an action of trover for such timber by the real owner; and a purchaser of the land on execution against such trespasser, who continues to trespass thereon in the same way, is equally liable.

ERROR to the Dauphin county common pleas, in an action of trover for the value of certain wood cut by the defendants on the land of the plaintiff's intestate. The title to said land was clearly in the plaintiff's intestate; but the defendants claimed that they were in possession under color of title, and therefore not liable in this action. It was proved by the defendants that they had purchased on execution against one Cardon, in 1833, certain property called the "Victoria iron works," with about one thousand six hundred acres of land attached thereto, the description of which in the levy was shown to include the tract on which the timber now in question was cut. It appeared in evidence that this tract adjoined that upon which the iron works were situated, and of which Cardon was, before said execution, the undisputed owner; that Cardon said the tract belonged to him, and he had been in the habit of cutting wood, and making coals and rails thereon, from 1829 to 1833; but that he had never

inclosed or cultivated it, or made any improvements on it. There had been a house on it, which had fallen down before Cardon built the iron works. It also appeared that the defendants, since their purchase, had cut wood on the land. The judge before whom the cause was tried instructed the jury, among other things, that the defendants had not shown such possession as would make them liable in ejectment, and, therefore, that they had not such possession as would defeat an action of trover. Verdict and judgment for the plaintiff, and the defendants brought error.

Foster, for the plaintiff in error.

Johnston, for the defendants in error.

By Court, GIBSON, C. J. Though trover is said not to be a proper action to try title to land, it is certain that it may be supported for the price of what was a part of the freehold, converted after severance from it, if the wrong-doer were not in the actual and exclusive possession. Such appears, from *Player v. Roberts*, 1 Jones, 243,¹ to be the law of the English courts, and if we regard no more than the naked point determined by our own, we shall see that our decisions, though full of jarring dicta, entirely agree with it. In *Mather v. Trinity Church*² [8 Am. Dec. 663], which was the first of them, it was ruled that trover for stone and gravel dug from a quarry, lies not by one who has the right of possession, against one who had the actual possession. Next in *Baker v. Howell*,³ it was ruled that assumpsit for money had, lies not for the price of sand sold from a bar of which the defendant was found to be in possession. Finally, in *Brown v. Caldwell*⁴ [13 Am. Dec. 660], the same principle was asserted in respect to replevin for slates quarried by a party who was an occupant. So far both decisions and dicta agree, and it is therefore to be taken for settled, that such an action lies not against a party who was in actual possession at the time of the severance. But no court has adjudged, nor can it be maintained on principle, that it lies not for a party out of such possession against a casual trespasser. Such a decision would disaffirm the well-founded principle, that legal seisin carries the possession with it wherever there is no adverse possession to displace it; and as there is no adverse possession of trees without possession of the land on which they grow, the property and possession of them as chattels, at the moment of their severance by a casual

1. 8tr Wm. Jones, 243.

2. 3 Serg. & R. 509.

3. 6 Serg. & R. 476.

4. 10 Serg. & R. 114.

trespasser, are united in the owner of the inheritance. Trover is not so exclusively founded on possession as trespass; and if, as is universally conceded, a constructive possession of unoccupied land is sufficient to support the latter for the felling of a tree, why may it not support trover for the asportation and conversion of it? The difference between the actual and constructive possession of a plaintiff consists not in an effect peculiar to either, but in the nature of the evidence necessary to establish it. The former is susceptible of proof by oral testimony, while the title must be produced to establish the latter; and hence a supposed locality of any action depending on it; a ground of objection not open to the party in this instance, as the action is in the county where the land lies. Of the incongruity of making trover a local action, and of the consequential inference that, being essentially transitory, it must be sustained, if at all, indifferently in the county and elsewhere, I shall speak when I shall have spoken of the defendant's claim to have been in the actual possession. At present I admit that if the action might not have been as well brought out of the county as within it, it can not be maintained.

Why should the defendants' undisputed possession of their own land be extended to the *locus in quo*? Even colorable title to it they had not. The Victoria works were started in 1829, and notwithstanding the absence of pretext for claim, this tract was used as woodland, from the first, as if it was a part of the domain. Wood was cut on it for coals and for rails, by direction of the manager, who also disposed of bark from it at a neighboring tannery; subsequently to which, the estate was seized in execution, and sold to the defendants, by boundaries which include the tract in question; and having thus received it, they cut the wood in question. A house that once stood on it had fallen down; and there was no clearing on it or inclosure whatever. Besides, during all the time mentioned, the plaintiff's intestate had paid the taxes. Such are the few and simple elements of what has been called a case of actual possession. Happily we have a standard for the measurement of it. "When I speak of possession," said Mr. Justice Duncan in *Brown v. Caldwell*,¹ "I mean an actual occupation; not a bare, solitary trespass by an intruder, but an actual, visible, notorious occupancy." But is there a difference, as regards occupancy, between a solitary trespass and repeated trespasses? None has been taken in any book of authority, and none can be taken in

reason. There could be no action of trespass with a *continuando*, if an ouster is necessarily constituted by indefinite repetitions of the injury. For this reason it is, that the ouster in the declaration in ejectment, was not laid with a *continuando*; in consequence of which, it was thought that mesne profits could not be recovered in that action; for, proceeding on the ground of an ouster, the plaintiff, though he recovered damages for the circumstances immediately attendant on it, could not maintain trespass for any injury subsequent to it, till he had regained the possession by the retroactive operation of an entry by process or otherwise. If repetition of a trespass alone, then, does not necessarily constitute an ouster, with what sort of occupancy must it be attended to have that effect? In *Johnston v. Irwin*, 3 Serg. & R. 291, it was ruled that though residence is not a necessary ingredient of adverse possession, there must be inclosure and cultivation. This was indeed predicated of possession to raise the bar of the statute of limitations; but why should there not be the same degree of possession, to bar an action for the produce of the soil, that is necessary to bar an action for the soil itself? Such an occupancy is indefinitely continuous, while the occupancy of a trespasser, who neither cultivates nor incloses, continues no longer than he remains in contact with the soil.

But it is supposed that a resident on adjoining land is in actual possession of all he uses for his ordinary purposes, according to its kind, as a part of his domain; and in this lies the vice of the argument. Where a particular tract of land is occupied by a resident on it, under a colorable title, his possession of it is co-extensive with the lines of the survey; but it is not admitted that he gains possession of his neighbor's unoccupied tract by crossing the intermediate boundary to trespass on it. "It is evident," said Mr. Justice Yeates, in *Gray v. McCreary*, 4 Yeates, 496, "that in a question of boundaries, evidence of possession does not apply with the same degree of force as when the whole of a tract is held adversely against the claimant." The entire course of the decisions has been to restrain possession without at least colorable title, as strictly to inclosures in this country, as it has been in England, and the English principle certainly is, that constructive possession is not to be admitted in the case of an intruder; as an exception to which, nothing gave rise to the notion that it was not universally applicable to lands in Pennsylvania, but our customary law of acquiring title to the lands of the state by settlement, which suggested to those who

had entered on appropriated land, the notion of claiming, by the statute of limitations, as much as they could have held by an improvement. Such a claim, however, has been constantly disallowed; and there never has been conceded to the possession of a trespasser, in the guise of a settler on appropriated land, without warrant or location, a single incident or feature of an improvement. Now, what difference, as to constructive possession, is there betwixt a settler seated on the tract itself, and one who, seated on an adjoining tract, cuts his rails and firewood on his neighbor's land as if it were his own? Certainly there is none in favor of the latter, coming in as he does with no design to hold the land by his entry, and taking no subsequent step to acquire it as a settler. If a settler on appropriated land shall not be deemed in constructive possession of woodland used by him as such, why shall a non-resident? But even constructive possession would ill serve the purpose of defense in an action like the present; for when an intruder is not in actual occupation, the constructive possession is in him who has the right—which, it will be seen, is sufficient to support the action. I grant that such a trespass may be a disseisin to support an ejectment at the election of the disseisee, but it certainly would not constitute a disseisin of him against his will. The books are full of cases illustrative of the distinction. Nor would the trespasser acquire a possession within the protection of the statutes of forcible entry and detainer. Why, then, shall he not answer in trover for the conversion of trees turned into chattels by his trespass? "The owner of a tract of land in Clearfield county," said Mr. Justice Duncan in *Brown v. Caldwell*,¹ "whose timber has been taken by a trespasser and sawed into boards, follows it to Lancaster county, and replevies it in the streets of the city; the doctrine of venues shows that this can not be done." In *Player v. Roberts*,² however, the same thing in principle was actually done. "If," as he had said in the same breath, "incidentally title in such action may be called in question," why may it not be done in all cases of the sort without regard to the locality; or how can it be called in question in an action of trover otherwise than incidentally? He evidently thought, that it comes into question directly, where it is the foundation of the possession; and incidentally only, when it is the consideration of a contract, which may be sued upon anywhere, because contracts have no locality. But neither has conversion locality; and title to land may be as much involved

1. 10 Serg. & R. 114.

2. Sir Wm. Jones, 243.

in the one as in the other. Nor does it follow that a dispute about the possession depends, in all cases, on the title; the right to the one, and to the other, are different things. Title, in an action like the present, by which compensation for a trespass is demanded, and not the land, is not the plaintiff's case; nor is it directly put in issue by the pleadings: it is questioned incidentally, if at all, like any other fact introduced by the evidence. It was, in truth, not questioned at all in the instance before us. It is not perceived, therefore, that the doctrine of venues furnishes an objection to a personal action. If it did, it would expose the wild lands, not only in Clearfield county, but in every other on the Allegheny and the branches of the Susquehanna, to pillage, for which there would be no redress. Trespassers on these are seldom found in the county to answer an action, nor are they often of sufficient ability to respond in damages; by reason of which, the only efficient remedy of the owner is pursuit of the property. A temporary sawmill is put up on the first convenient stream, without regard to tract or survey; and if this is such a possession of the contiguous tracts from which timber is taken in the course of the sawyer's business, as to prevent the owners from following it *in specie*, or if they are prevented from doing so, independently of the question of possession, by a supposed locality of the injury, they are left without a practical remedy. Is not the sawyer's case, in principle, that of an iron-master, who, once in fifteen years, uses an adjacent tract of unseated land to strip it of its timber, while he leaves every other act of ownership, such as payment of taxes, to be performed by the rightful owner? The wood is usually coaled on the land; and hence there is said to be at least a temporary possession during the process. But the same may be said of a shingle-taker's occupancy of his shed, while he works up the product of his trespass.

The true reason why trover or replevin lies not against an actual occupant, is not any supposed locality of the question, but the impolicy of suffering him to be harassed with a separate action for each bushel of wheat consumed, or stick of firewood burned, on the premises, instead of having the matter settled at once by an action to recover the possession. Chief Justice Tilghman glanced at it in *Mather v. Trinity Church*¹ [8 Am. Dec. 663], where he said the owner might first recover the possession by ejectment, and then recover the mesne profits by an action of trespass. There is substance in a reason like that; but there

1. 3 Serg. & R. 509.

is only form in an objection on the doctrine of venue, whose general inconvenience is manifest in the efforts of the profession to get away from it. Though all personal actions were transitory at the common law, because, as it was said in *Bulwer's case*, 7 Rep. 61, *debitum et contractus sunt nullius loci*, yet to the intent that debt, account, and all such actions, should be brought in the county where the contract was made, it was enacted by 6 Rich. II., c. 2, that if it appeared by the declaration that the action was not brought in the county in which the contract was made, the writ should abate; in the interpretation of which it was held that if the discrepance appeared entirely by the record, it would be error—an interpretation which precluded an advantage from a discrepance between the declaration and the evidence at the trial. And the inconvenience of the statute is still further visible in the fiction employed to elude it in an action on a foreign bill, bond, or note, which must be described as having been made at the place where it bears date; in regard to which the practice has been to state the place truly, and then to aver that it is in the county in which the action is brought, as, for instance, “at Calcutta, in the East Indies, to wit, at London, in the ward of Cheap.” Much as I dislike fiction in these matters, I would, were it necessary, consent to support an averment that Clearfield county, or any other place, is in the streets of Lancaster, rather than suffer an injury to pass without a remedy. In the leading case of *Fabrigas v. Mostyn*, Cowp. 176, Lord Mansfield said: There is a substantial and a formal distinction as to the locality of trials. The substantial distinction with regard to matters arising within the realm, is where the proceeding is *in rem*, and where the effect of the judgment could not be had if it were laid in a wrong place, as in the case of ejectments, where possession is to be delivered by the sheriff of the county; and as the officers are county officers, the judgment could not have effect if the action were not laid in the proper county. The formal distinction arises from the mode of trial; for trials in England being by jury, and the kingdom being divided into counties, and each county being considered as a separate district or principality, it is absolutely necessary that there should be some county where the action is brought in particular, that there may be process to the sheriff of that county to bring a jury from thence to try it.” After this, is it not too late to insist on the old distinctions by which everything that savored of the land was local; as debt for rent when not founded on the contract; debt against the executor of a

tenant for life; debt by an executor for the arrears of a rent charge; debt in the *debet* and *detinet* against the executor or administrator of the lessee: and a thousand other instances mentioned in *Bulwer's case*?

An objection on the ground of locality is purely technical, and not to be favored; for there is nothing inherently local in the trial of title to land; and if there were, an objection on the foot of it would prevail in all cases, whether it were incidentally drawn into contest or not. The muniments of it may be produced everywhere with equal facility; and the witnesses to the facts involved in it as often reside out of the county as within it. The jurors of one county too, are just as competent in respect of moral and mental qualifications as those of another. But though popular prejudice against a party or a title sometimes makes its locality a grievance, I admit that where the land itself is demanded, the action must be brought in the county, and the same thing may, perhaps, be said of trespass, in which the issue is, or may be, formally joined on the title. In the case before us, the issue was not on the title; and that it was introduced into the case by the evidence, shows that it was only incidentally involved. But the doctrine of locality has been urged for the sake of an argument deduced from its general consequences. No objection was made on that ground in *Player v. Roberts*,¹ and we are to conclude that it was thought to be untenable. In the case before us, possession from title having been shown, without adverse possession to rebut it, the plaintiff was entitled to recover.

Judgment affirmed.

PROPERTY NECESSARY TO MAINTAIN TROVER FOR CHATTELS: See *Hudspeth v. Wilson*, 21 Am. Dec. 344, and other cases and annotations in this series referred to in the note thereto. The general owner, though out of possession, may maintain trover for chattels against a stranger who takes them away: *Bird v. Clark*, 3 Id. 269. Trees cut on land held temporarily by another become personal property, and belong to the owner of the inheritance, who may maintain trover therefor: *Truss v. Old*, 18 Id. 748; see also, *Moore v. Wait*, 20 Id. 667. The general owner can not maintain trover against one in actual adverse possession of land for stone and gravel taken therefrom: *Mather v. Trinity Church*, 8 Id. 663, and see the note to that case. Nor will replevin lie by the owner of land against one in actual possession, under claim of title for slate taken, or trees cut therefrom: *Brown v. Caldwell*, 13 Id. 660; *Snyder v. Vaux*, 21 Id. 466.

ADVERSE POSSESSION, WHAT NECESSARY TO CONSTITUTE: See *Rung v. Shoneberger*, 26 Am. Dec. 95, and the note thereto collecting the previous notes and cases in this series on the same subject. See also *Sumner v. Murphy*, 27 Id. 397, and note; *Smith v. Hosmer*, 28 Id. 354. The doctrine laid down in

the above reported case of *Wright v. Guier*, that the use of a tract of unseated land as a wood-lot is not sufficient to constitute such an adverse possession as will oust the real owner's right to sue in trover for the wood so taken, is approved and held to apply also to an adverse possession under the statute of limitations, in *Sorber v. Willing*, 10 Watts, 141. The case is also referred to as an authority as to what is sufficient to constitute adverse possession, in *Baring v. Peirce*, 5 Watts & S. 552, and *Adams v. Robinson*, 6 Pa. St. 272. In case of uncultivated land, possession can be proved only by proving title: *Harlan v. Harlan*, 15 Id. 515, citing *Wright v. Guier*.

WEAKLY v. BELL AND STERLING.

[9 WATTS, 273.]

PROOF OF PRIOR OR INTERMEDIATE INDORSEMENTS IS UNNECESSARY in an action by an indorsee against an indorser of a note, to entitle the note to be admitted in evidence, where such indorsements are not averred in the declaration.

INDORSEMENT OF NOTE IS AN ADMISSION of the drawer's handwriting and of all prior indorsements on the note.

POSSESSION OF NOTE BY INDORSER IS PRIMA FACIE EVIDENCE that he has paid it and taken it up, as against a prior indorser, where the indorsement is in blank.

PROOF OF POSTING OF NOTICE OF DISHONOR OF NOTE to be sent by mail to an indorser, must be distinct and certain. Accordingly, where a witness deposes that he caused the notice to be sent, and that "to the best of his knowledge" the letter was put into the post-office, because he is not aware of any neglect of that kind having ever occurred in the holder's store, is insufficient.

NOTE GIVEN BY MAKER OF DISHONORED NOTE FOR SAME DEBT, payable at a future day, without any new consideration, or any agreement to extend the time or to give up the old note, or to take the new note in satisfaction of the old, does not discharge the old note or release an indorser thereon.

NOTICE OF NON-PAYMENT OF NOTE DIRECTED TO INDORSER at his place of residence, "Walnut Bottom, near Carlisle," the county town, Walnut Bottom being a well-known place in the county, is sufficient, although, unknown to the holder, there is a post-office much nearer the indorser's residence than Carlisle, at which he usually gets his letters, and although there are other persons in the county of the same name, but not residing so near to Walnut Bottom.

ERROR to the Cumberland county common pleas, in an action of debt on a note. The defendant was the second indorser on the note, and the plaintiffs were subsequent indorsers. There was one intermediate indorser, and there were also some indorsements subsequent to that of the plaintiffs, which are sufficiently referred to in the opinion. The defendant's indorsement was admitted, and the note was then offered in evidence, but objected

to by the defendant, because there was no proof of the prior and intermediate indorsements, and no proof of title in the plaintiffs, and because the note offered in evidence was not the same as that described in the statement. The note was admitted and a bill of exceptions sealed. To prove notice the plaintiffs introduced a deposition of one Heli, who testified that "he caused to be put into the post-office," at the plaintiff's request, a letter to the defendant, a copy of which was annexed to the deposition, which letter was directed to the defendant at "Walnut Bottom, near Carlisle, Pa.," and that "to the best of deponent's knowledge this letter was put into the post-office, for he is not aware of any neglect having ever occurred in the store of this kind." The defendant objected to this as insufficient evidence of notice, and introduced evidence to show that there was no post-office at "Walnut Bottom," but that there was a post-office called "Dickinson," half a mile from the defendant's residence; that he resided nine or ten miles from Carlisle, and that there were two other persons of the same name residing in the county nearer to Carlisle than himself. The court nevertheless admitted the deposition, and allowed a bill of exceptions. On the part of the defendant, evidence was introduced to show that after the maturity and protest of the note two new notes were given by one of the makers to the plaintiffs for the amount, including also another debt owing to the plaintiffs, and payable a certain number of days after date. There was conflicting evidence as to whether these notes were given as collateral security or in satisfaction of the old note. The evidence on that point is sufficiently stated in the opinion. The defendant requested the court to instruct the jury in substance as follows: 1. That if the notes referred to were taken by the plaintiffs for the note in suit, and for another debt in which the indorsers had no interest, payable at future times, the defendant was discharged; 2. That if, in addition to the foregoing facts, it should appear that the makers had, while the new notes were running, ample property out of which the money could have been made, the indorsers were released; 3. That if the plaintiffs, having indorsed the note to other parties, who in turn had indorsed it to others, the plaintiffs, to prove title to it, must show that they had paid it; 4. That if the jury believed the evidence introduced by the defendant in support of his objection to the proof of notice, that proof was insufficient; 5. That the evidence as to putting the notice into the post-office was not legal evidence. The court charged the jury in answer to the first and second points, in substance, that it was for them

to say, upon the evidence, whether the new notes were taken in lieu and in satisfaction of the note in suit, or as collateral security; if the former, the plaintiffs could not recover, otherwise they could; and the court further expressed its opinion that the evidence indicated that the notes were taken as collateral security. As to the third point, the court charged that the plaintiffs as subsequent indorsers of the note, having possession of it, and all the indorsements being in blank, could pass over or strike out all the indorsements subsequent to the defendant's, and recover on the note without proving that they had paid it and taken it up, their possession being *prima facie* evidence of title. As to the fourth and fifth points, the court refused to charge as requested. Verdict and judgment for the plaintiffs. The errors assigned by the defendant all appear from the opinion except the fourth, which was that the court erred in their answer to the defendant's third point.

Watts and Alexander, for the plaintiff in error.

Graham and Biddle, for the defendants in error.

By Court, KENNEDY, J. The first error assigned is an exception to the opinion of the court below, admitting the note, with some of the indorsements thereon, to be read in evidence to the jury, without proof having been first made that all the indorsements were true. It certainly was not requisite to make proof of all the indorsements as they appeared on the notes, to entitle the plaintiffs below to give it in evidence to the jury, unless they had been averred in the declaration to have been made, which does not appear to be the case; nor yet to entitle them to recover the amount of it. Proof that the note was indorsed by the defendant below to the plaintiffs, if he were their immediate indorser, or if there were an intermediate indorser, and it be stated in the declaration, then, perhaps, also of such indorsement, was all that was necessary to give the plaintiffs a right to have the note read in evidence to the jury. But if such intermediate indorsement be omitted in the declaration, the plaintiffs had a right to strike it out on the trial, as the first indorsement was in blank, and to proceed as if it had never been on the note: *Cooper v. Lindo*, B. R., 3 Selw., 4th ed., 356, note K; *Bosanquet v. Anderson*, 6 Esp. 43; *Sidford v. Chambers*, 1 Stark. 326; *Walwyn v. St. Quintin*, 1 Bos. & Pul. 658; *Charters v. Bell*, 4 Esp. 210; *Smith v. Chester*, 1 T. R. 654; *Morris v. Freeman*,¹ 1 Dall. 193; *Craig v. Broaz*,² 1 Pet. 171. The indorsement of the de-

1. *Morris v. Foreman*; 8 C., 1 Am. Dec. 235.

2. *Craig v. Brown*, Pet. C. C. 171

fendant below was admitted to have been made by him, which was the very best proof of the fact that it was susceptible of, and of course rendered any other or further proof thereof unnecessary. His indorsement, therefore, being thus established, was sufficient not only to bind him, even if the note and the prior indorsements thereon had been forged, but was in effect an admission of the handwriting of the drawer of the note, and all prior indorsements thereon: *Lambert v. Pack*, 1 Salk. 127; 1 Ld. Raym. 443; 12 Mod. 244; S. C., Holt, 117; *Free v. Hawkins*, Holt N. P. C. 550; *Critchlow v. Parry*, 2 Camp. 182; *Charters v. Bell*, 4 Esp. 210. And as to the interest of the plaintiffs below in the note, at the time of the institution and trial of the action; their having possession of it was *prima facie* evidence of their right to demand payment from the defendant. It is true that the plaintiffs, before the note became payable, being holders of it, passed it away by indorsement to Horner & Wilson, and they to Mr. Andrews, who transmitted it to the Carlisle bank for collection, where it was protested at maturity for non-payment; but the indorsement upon it being in blank, and the plaintiffs afterwards having obtained the possession again, was *prima facie* evidence that they had paid and taken it up: *Gorguat v. McCarty*,¹ 2 Dall. 144; S. C., 1 Yeates, 94; *Pigot v. Clark*, 1 Salk. 126; S. C., 12 Mod. 193; *Norris v. Badger*, 6 Cow. 429;² *Ellsworth v. Brekier*,³ 11 Pick. 316; *Lonsdale v. Brown*, 3 Wash. C. C. 404. We therefore think that the court below were right in permitting the note, with the indorsement of the defendant, to be read in evidence to the jury. It will be sufficient to remark here, in answer to the fourth error assigned, that the last position laid down above, and the authorities cited in support thereof, show clearly that it can not be sustained.

The second error assigned is also an exception to the opinion of the court, admitting the deposition of James Heli, as evidence to prove that a notice was put into the post-office, addressed to the defendant, advising him that the note had been duly protested for non-payment. The first ground of objection to this deposition, as being given in evidence for such purpose, is the only one which can be regarded as having any weight. It is this, that the deponent, from what he has testified to on the subject, shows, in effect, that he neither put the notice into the post-office himself, nor did he see it done, but thinks it was done, because he knows that such notice was made out, and left

1. *Gorguat v. McCarty*; S. C., 1 Am. Dec. 270. 2. 6 Cow. 449. 3. *Ellsworth v. Brewer*.

for or given in charge, as may be inferred, to one in the store, whose business it probably was to take the letters thence and put them into the post-office; and that he was not aware that any neglect on the part of such person to do so had ever occurred. Notice sent by the post, properly directed, is sufficient, though the letter containing it should miscarry: *Esdaile v. Sowerby*, 11 East, 117; *Saunderson v. Judge*, 2 H. Bl. 509; *Dobree v. Eastwood*, 3 Car. & P. 250; *Smith v. Bank of Washington*, 5 Serg. & R. 322; *Smyth v. Hawthorn*, 3 Rawle, 355. But it must be proved certainly and distinctly that the letter was put into the receiving house or post-office: *Scott v. Lifford*, 1 Camp. 246; 9 East, 347; *Smith v. Mullett*, 2 Camp. 208; *Hilton v. Fairclough*, Id. 633; *Dobree v. Eastwood*, 3 Car. & P. 250. And proof of the delivery of it to a bellman in the street, will not be sufficient: *Hawkins v. Rutt*, Peake, 186; Roscoe on Bills, 206. Nor will it be sufficient for the witness, called to prove the notice, to swear that he either put the letter into the post-office himself, or delivered it to another clerk for that purpose; he must swear positively, and not doubtfully, to his having put it in himself: *Hawkes v. Saller*, 4 Bing. 715; S. C., 15 Eng. Com. L. 125.¹ In has, however, been said, if a porter be called, and he says, that although he has no recollection of the letter in question, yet that he invariably carried to the post-office all the letters found on his master's table; and another witness prove that a particular letter, giving notice, was so left, that may suffice: *Hetherington v. Kemp*, 4 Camp. 192; Chitty on Bills, 8th Am. ed., from the 8th Lond. ed., 511, 512. But evidence short of this, to prove notice, ought not to be received; or if received, the court ought not to leave the fact, of notice having been given upon it, to the jury, to be decided by them; or if the court does so it will be error. In the case under consideration, then, it is manifest that the evidence offered and received fell greatly short of anything that has ever been ruled or said to be sufficient; and certainly did not go to show that the notice spoken of had ever been put into the post-office. The deponent, by whose evidence the plaintiffs below attempted to establish the fact, that notice was given, shows plainly that he did not put the letter containing it into the post-office, nor yet see it done; so that there was really no proof whatever given of the letter having been put into the post-office at any time. We therefore think, that that part of Heli's deposition which relates to this particular ought to have been suppressed and not given in evidence: or otherwise, when re-

1. 13 Eng. Com. L. 706.

ceived, that the court ought to have directed the jury, positively, to find a verdict for the defendant below, because no evidence had been given, tending to prove that notice of non-payment of the note in suit had been given to the defendant.

The third error, which is the next in order, is an exception to the answers of the court, given to the first and second points, submitted by the counsel for the defendant below. The only question, seeming to arise out of these points, which can be regarded as at all material to the defendant below is, whether taking, about a year after the note in suit had become payable, and been protested for non-payment, two new notes drawn by Gray, one of the drawers of the first, as a collateral security for the payment of the debt mentioned in the first note, including also an additional sum of money owing by the drawers of the first to the plaintiffs, at fifteen and thirty days thereafter, without any agreement on the part of the plaintiffs below to give time for payment of the first note, released the defendant below from his liability as the indorser thereof.

The evidence given on the part of the plaintiffs below, went to show clearly that they agreed to accept of the new notes as collateral security merely, and that the old were not to be delivered up, but retained by them. On the other hand, again, the evidence for the defendant tended to prove distinctly, that the new notes were given in satisfaction of the old; and that it was the understanding, that the old should, upon the giving of the new, be delivered up; but that the plaintiffs, upon receiving the new, refused to do this. The court upon this evidence submitted it to the jury, as a question of fact, to be decided by them, whether the new notes were given as collateral security only for the debt mentioned in the old, or in satisfaction thereof. The jury, by finding for the plaintiffs below, have decided that the new notes were given as collateral security merely. Upon this subject, the general rule seems to be, that if one indebted to another by simple contract, give his creditor a promissory note, drawn by himself, for the same amount, without any new consideration, the new note shall not be deemed a satisfaction of the original debt, unless so intended and accepted by the creditor: *Hart v. Boller*, 15 Serg. & R. 162 [16 Am. Dec. 536]; *Roberts v. Gallagher*, 2 Wash. C. C. 191.¹ And most clearly all the authorities go to show that, at law, accepting of a security of equal degree, either from the debtor himself, with or without a surety, or from a stranger alone, at the instance of the debtor,

1. *Gallagher v. Roberts*.

is no extinguishment of the first debt; as where a second bond is given to the obligee; for one bond can not determine the duty of another: Cro. Eliz. 304,¹ 716,² 727;³ Brownl. 74;⁴ Cro. Car. 85,⁵ 86;⁶ 1 Burr. 9;⁷ 1 Stra. 427;⁸ Brownl. 47,⁹ 71;¹⁰ Hob. 68, 69;¹¹ 1 Mod. 225;¹² 2 Id. 136;¹³ Cro. Jac. 579;¹⁴ 3 Lev. 55;¹⁵ *Hamilton v. Calender's Executors*, 1 Dall. 420. In *Lovelace and Wife v. Cocket*, Hob. 63-69; S. C., Brownl. 47, being an action of debt upon a bond given to the wife when sole, the defendant pleaded, that at the day of payment, he and his son, naming him, gave a new bond to the wife, who was still sole, for the payment of the same money on a future day, in satisfaction of the first bond, which was so accepted; whereupon the plaintiffs demurred; and the court gave judgment thereon in their favor. *Norwood v. Grype*, Cro. Eliz. 727, is also to the same effect. And in *Hawes v. Birch*, Brownl. 71, the action being debt upon a bond, the defendant pleaded that a stranger, naming him, at the defendant's request, on the day the bond in suit became payable, made an obligation to the plaintiffs in lieu of the first debt; and it was adjudged by the whole court that the plea was naught. And it would seem as if the court thought the new bond rather of less force as a plea for the defendant, than if it had been given by himself, for they say, "being done by a stranger, was by no means good." Neither could the defendant, I apprehend, even in equity, claim upon any principle of justice to be relieved from the first bond, without showing a distinct agreement, that the second bond was given and accepted in discharge of the first: but if that could be made to appear, I do not see any reason why the defendant should not have the benefit of such agreement: *Roberts v. Gallagher*, 2 Wash. C. C. 191.

In *Day et al. v. Leal et al.*, 14 Johns. 404, it was held that a collateral security, even of a higher nature, as a bond and warrant of attorney, on which judgment is entered, does not extinguish the original contract, as long as it remains unsatisfied. There the action was brought to recover the amount of two promissory notes; after they had become payable the bond and warrant of attorney were given by one of the drawers of the notes, to secure the payment of the same debt mentioned in them, and an additional sum of money owing to the plaintiffs by the obligor and another person, not one of the drawers of the

1. *Balston v. Baster*.2. *Manhood v. Crick*.3. *Norwood v. Grype*.4. *Rawdon v. Turton*.5. *Lovelace v. Cocket*.6. *Maynard v. Crick*.7. *Roades v. Barnes*.8. *Cumber v. Wane*.9. *Lovelace v. Cocket*.10. *Hawes v. Birch*.11. *Lovelace v. Cocket*.12. *Blythe v. Hill*.13. *Peck v. Hill*.14. *Lutterford v. Le Mayre*.15. *Lobly v. Gildart*.

notes. And the court seemed to think that the two circumstances, to wit, that of the bond and warrant being given by one only of the drawers, and the additional sum of money being included in it, tended strongly to show that the bond was intended to be only a collateral security. The like circumstances exist in the case before us, but with the addition of another circumstance, making the case still more favorable for the plaintiffs, which is, that both securities are of equal degree. This court also held, in the case of *Wallace v. Fairman*, 4 Watts, 378, that a specialty or single bill taken by the creditor of a firm from one of the partners thereof, for the payment of the debt owing to him by the firm, for which he gave, at the time, a receipt, expressing that the specialty, "when paid," would be in full of his claim against the firm, and upon which he afterwards obtained a judgment, was no extinguishment of the original claim, because it appeared to have been taken as a concurrent and additional security. But let us turn to cases resembling the present so closely, that they can not in principle be well distinguished from it, and see what the rule is which has been applied in deciding them.

In *Pring v. Clarkson*, 1 Barn. & Cress. 14; S. C., 8 Eng. Com. L. 7, it was ruled that the acceptance of a new bill from the acceptor of the first, after the latter had become payable, for the payment of the same debt at a future day, could only be considered a collateral security, and therefore did not amount to or imply an agreement to give time to the acceptor, and consequently did not release the other parties to the bill first given. Abbot, C. J., in pronouncing the opinion of the court, says: "In no case has it been said that taking a collateral security from the acceptor shall have the effect of giving time to him, and consequently of releasing the other parties to the first bill." Mr. Chitty, in his treatise on bills of exchange, 442 (8th Am. ed. from the 8th London ed.), though he admits the effect of this case to be, that the mere taking of fresh security from the acceptor for the payment of the money at a future day, without a bargain to give time, will not discharge the drawer or other parties to the bill; yet he makes a *quære*, whether the mere taking or receiving further security, payable at a future day, would not, in general, imply an agreement to wait till it should become due. But in the previous case of *Bedford v. Deakin, Bickley, and Hickman*, 2 Stark. 178, where the three defendants, when partners, drew the bill upon which the suit was brought, but subsequently having dissolved partnership, and Hickman having

become bankrupt, Bickley, wishing an arrangement to be made as to the securities which the plaintiff held from the three defendants, proposed to give his own notes as a security, payable at the respective periods of four, eight, and twelve months. The plaintiff agreed to accept of the new security thus offered, reserving, however, to himself the security which he held from the three defendants. The new notes were accordingly drawn by Bickley and a surety of the name of Rushburg, for the original sum and interest calculated up to the times when the respective payments were to be made and delivered to the plaintiff, he retaining the first bill in his possession. Lord Ellenborough held that the original liability of the defendants was not thereby altered; and distinguished this case from *Evans v. Drummond*, 4 Esp. 89, by saying that "the separate note of the partner there was taken as a substitute and in exchange for the security which had been given by the partners; but here the notes, he said, were taken as a mere collateral security. If there had been an agreement to postpone the payment of the original debt, without the consent of Deakin, I should have assented to the objection; but there was no such agreement." He also laid stress on the circumstance that the original security was not delivered up, which he said distinguished the case from all the cases cited. Mr. Justice Bailey, also, without any seeming disapprobation, in the last edition of his treatise on bills, see 2d American ed. (Boston, 1836), from the 5th London ed., 369, lays it down, from the case of *Pring v. Clarkson*, that "taking a fresh bill from the acceptor as a collateral security, will not discharge the drawer unless there be a bargain for time."

In conformity to this principle, it was decided in *Ripley v. Greenleaf*, 2 Vern. 129,¹ that taking a new note on time, as a security for the payment of the money mentioned in the first note, does not discharge the indorser, unless there be an agreement not to sue the maker on the first note. Hence it appears that taking a new note for the same debt mentioned in the old, without any agreement to give time to the drawer, or to deliver up the old note to him, or that the new shall be taken in satisfaction of the old note, has ever been considered a mere collateral security, which does not affect or alter the original liabilities of the parties on the old note in any respect whatever. The case also of *Gould v. Robson*² may be considered as having been decided with a view to the recognition of this principle, though it may be questionable whether the court did not go too far there in deciding that

1. 2 Vt. 129.

2. 8 East, 576.

there was an agreement to give time. The holder of the bill, upon receiving part of it at maturity, took a second bill for the residue, payable at a future day, agreeing to hold the original bill as a security until the second should become payable; and the court were of opinion that the agreement to hold the original bill until the second should become payable, amounted to an agreement, on the part of the holder, not to sue on the original bill until the second should become payable, and consequently the drawer was thereby released. We, therefore, conceive that the third error can not be sustained.

The fourth error having been noticed and settled at the conclusion of what was said on the first error, we come now to the fifth error. It is an exception to the answer of the court to the fourth point submitted by the counsel of the defendant below. The letter of notice to the defendant, advising him of the non-payment of the note, was proved to have been directed to him at Walnut Bottom, near Carlisle, which, it would seem, was the place of his residence; but it was shown that, although there was a post-office in Carlisle, it was some nine or ten miles from Walnut Bottom, the place where the defendant resided; and that there was a post-office called Dickinson within half a mile of his residence. The counsel of the defendant below, therefore, requested the court, in the fourth point, to instruct the jury that, if the letter was put into the post-office at all at Philadelphia, it must have been mailed, from the direction on it, for the post-office at Carlisle, where the defendant would not look for it or be likely to receive it, instead of Dickinson post-office, where he would have received it with some certainty, as the latter was the post-office at which he generally received letters addressed to and intended for him. We are not prepared, however, to say that the court erred in refusing to give the instruction here asked for; because, at the distance of one hundred and thirty miles from Philadelphia, it may be impracticable to ascertain by inquiry in the latter place, whether there be a post-office nearer to the residence of an individual who resides in the county, than that which is located in the town which is the seat of justice in the county wherein he resides. And if it were to be decided that the letter must be addressed, in all cases, so that it shall be sent to the nearest post-office to the residence of the defendant, it might subject the plaintiff to the expense and inconvenience of sending a special messenger a distance of several hundred miles in order to give the defendant personal notice, or to ascertain the name of the nearest post-

office to him, and have the letter forwarded by mail to it. This would seem to be more than ought to be required; because, if a notice should be sent to the post-office of a county town, addressed to a person as residing at a particular place in the county, as well known in the county town as Walnut Bottom is in Carlisle, the postmaster receiving the letter containing the notice at his office in the county town, would doubtless, as it would be his duty, forward it to the post-office nearest to such person's residence, that he might receive it as early as possible. The circumstance of there being two other James Weaklys does not seem to raise any material objection to the direction of the letter, for it seems that the defendant resided much nearer to the Walnut Bottom than either of them, and therefore better suited the direction of the letter.

As to the sixth error, which is the only remaining one, it is sufficient to observe that it has been sufficiently answered in the discussion of the second error.

Judgment reversed, and a *venire de novo* awarded.

INDORSEMENT GUARANTEES GENUINENESS OF SIGNATURE OF PRIOR PARTIES: See *State Bank v. Fearing*, 23 Am. Dec. 235, and note.

HOLDER OF NOTE OR BILL PRESUMED OWNER: See *Morris v. Foreman*, 1 Am. Dec. 235; *Smith v. Lawrence*, Id. 556; *Cruger v. Armstrong*, 2 Id. 126; *Conroy v. Warren*, Id. 156; *Jones v. Westcott*, 3 Id. 704; *Bolton v. Harrod*, 13 Id. 306; *Beltzhoover v. Blackstock*, 27 Id. 330. An indorser in possession of a bill specially indorsed can not recover thereon against the acceptor without proving that he has paid the amount to a subsequent indorser: *Gorgerat v. McCarty*, 1 Id. 270. A blank indorsement vests the holder with a right of action against all preceding parties: *Abat v. Rion*, 13 Id. 313; *Rees v. Conococheague Bank*, 16 Id. 755. As to the holder's right to fill up or strike out indorsements, see *Smith v. Lawrence*, 1 Id. 556; *Morris v. Foreman*, Id. 235; *Ritchie v. Moore*, 7 Id. 688, and note; *Hill v. Martin*, 13 Id. 372; *Hunter v. Hempstead*, Id. 468, and note. That the holder may recover of a prior indorser in blank, without regard to subsequent special indorsements, see *Heis v. Bailey*, 35 Id. 214.

PROOF OF SENDING NOTICE BY MAIL, SUFFICIENCY OF: See *Müller v. Hackley*, 4 Am. Dec. 372; *Bank of Elizabeth v. Ayers*, 11 Id. 535; *Hoff v. Baldwin*, 13 Id. 385; *Smith v. James*, 32 Id. 527; *Crocker v. Crane*, 34 Id. 228. That certain and distinct proof of the posting of the notice is required to charge the indorser is held, citing *Weakly v. Bell*, in *Schoneman v. Fegley*, 7 Pa. St. 438.

NOTE GIVEN FOR PRE-EXISTING DEBT, WHEN DEMIED PAYMENT: See *Homes v. Smith*, 32 Am. Dec. 650; *Estate of Davis*, 34 Id. 574, and other cases cited in the notes thereto. That the acceptance of a security of equal degree, for a pre-existing debt, does not, without a distinct agreement to that effect, extinguish the debt so as to release any of the parties, is a point to which *Weakly v. Bell* is cited as authority in *Bank of Pennsylvania v. Potius*, 10 Watts, 150; *Covely v. Fox*, 11 Pa. St. 174; *Oliphant v. Church*, 19 Id. 320.

NOTICE BY MAIL, SUFFICIENCY OF DILIGENCE REQUIRED IN ASCERTAINING INDORSEER'S RESIDENCE: See, on the first point, *Reid v. Payne*, 8 Am. Dec. 311; *Bank of Columbia v. McGruder*, 14 Id. 271; *Bank of United States v. Lane*, Id. 595; *Gist v. Lybrand*, 17 Id. 595; *Nichol v. Bate*, 27 Id. 511; *Vigers v. Carlon*, 33 Id. 575; *Foreman v. Wikoff*, 35 Id. 212. On the question of diligence, see *Vigers v. Carlon*, *supra*, and *Bank of Utica v. Bender*, 34 Id. 281, and other cases collected in the note to the latter decision.

GREEN v. BOROUGH OF READING.

[9 WATTS, 382.]

MUNICIPAL CORPORATION IS NOT LIABLE FOR GRADING STREET which is not level, under a charter authorizing it to improve the streets, although the complainant's property is injured thereby, there being no allegation of malice or wanton disregard of private right.

ERROR to the common pleas. The nature of the action is stated in the opinion. Verdict and judgment below in favor of the defendants, which the plaintiff now seeks to reverse.

Hoffman and Heckert, for the plaintiff in error.

Strong, for the defendant in error.

By Court, HUSTON, J. The plaintiff in error was plaintiff below, and brought this suit to recover damages from the borough of Reading, for filling clay and gravel in one of the streets of that borough, opposite the dwelling-house of the plaintiff. None of the facts or of the testimony was brought up; and we have the naked question, whether in one of our boroughs, where by the act of incorporation the power of improving and repairing the streets is given to the corporate officers, they can fill up a hollow place or dig down a hill which is too steep for convenient use. By an act of assembly passed the twenty-ninth of March, 1818, concerning the borough of Reading, among other powers given to the corporation in the sixth section, they are empowered "to make such ordinances as by a majority shall be deemed necessary to promote the peace, good order, benefit, and advantage of said borough, particularly providing for the regulation of the markets; improving, repairing, cleansing, and keeping in order the streets, lanes, alleys, and highways of said borough; for making ditches, drains, and sewers, to dispose of and carry off the water of said borough." In the language of the president of the common pleas, "the law confers the power to improve the streets; this involves that which was done by the defendants. In the improvement of

streets, it is often necessary to cut down some places and to fill up others. No town (except one on a nearly level site) could be improved unless the streets could be thus graded." There was not, as appears from the opinion of the court, any allegation of malice, or even of wanton disregard of private rights; it also appears that it was done in pursuance of a regulation made some time since, and which has been carried into effect in different parts of the borough. Every man sees, when he purchases or builds, whether his lot is on high or low ground, whether the street is level or steep opposite to his property; and he is bound to know, that every highway or street may, by law, be made more convenient for public use, than it was in a state of nature. That hills may be cut down, and low or swampy places raised; that if one side of the road or street is higher than the other, it may be made level from side to side, though in doing this, a house on one side may be left somewhat more above the level than could be wished, and on the other somewhat below it.

Although this power has not, so far as we know, been controverted in this state, yet it seems to have undergone judicial decision in other places. It came before the court of king's bench in 4 T. R. 794,¹ and was decided in favor of those who raised the road. It again appeared in the common pleas, *Sutton v. Clarke*, 6 Taunt. 29, where it was decided on the point, that defendant was acting under the authority of an act of parliament, deriving no emolument to himself personally, and acting to the best of his skill, and within the scope of his authority, and so not liable for consequential damage; this case, says Chief Justice Gibbs, is totally unlike that of an individual, who, for his own benefit, makes an improvement on his own land according to his best skill and diligence, not foreseeing it will produce injury to his neighbor; if he thereby though unwillingly injure his neighbor, he is liable. The resemblance fails in this most important point, that his act is not done for a public purpose, but for private emolument; here the defendant executes a duty imposed on him by the legislature, which he is bound to execute.

The matter did not rest here, it came again before the king's bench: 2 Barn. & Cress. 703.² An act of parliament had authorized certain persons to make, alter, and improve a road. The court observed that digging down and filling up, were the most ordinary and most effectual way of improving roads; the case in 4 T. R. 794, is cited and approved, as also *Sutton v. Clarke*, and

1. *Cast Plate Manufacturing Co. v. Meredith*.

2. *Boulton v. Crouther*.

it is laid down, that if those appointed by law to make or improve a road act within their jurisdiction, and with their best skill, they are not answerable for consequential damages; that they may be answerable if they act arbitrarily, carelessly, or oppressively: and this disposes of the case in 3 Wils. 461,¹ where for so acting they were held liable; and also of 4 Ohio, 500,² where it was said to be done oppressively and maliciously. There is also a case in 7 Pet. 443.³ The supreme court of the United States decided that they had not jurisdiction, but the case was an action against the city of Baltimore, for damages consequent on certain improvements of the streets, and in the city court damages were recovered, but on a writ of error this was reversed in the court of the last resort in Maryland, and they refused to grant a *venire de novo*, because no action lay.

In the commencement of the opinion of Chief Justice Gibson, in 3 Penn. 259,⁴ where the point was not precisely the same as here, yet he recognizes the power of improving and making safe and convenient the streets, and it is treated as a power incident to every incorporated borough or city. If I am not mistaken in my recollection, the same matter has been decided in the same way in Massachusetts. On authority, then, and on principle, the decision of the common pleas was right, and I suspect, though there may be a temporary inconvenience, the plaintiff will find he has not been injured; no one thing which can be effected by man, tends more to increase the growth and prosperity of a town or city than good streets. The advantage to the whole town soon raises property in every part of it, and is to the advantage of every inhabitant.

Judgment affirmed.

POWER OF MUNICIPAL CORPORATIONS TO GRADE OR REGRADE STREETS: See *Keasy v. City of Louisville*, 29 Am. Dec. 395, and note; *State v. Mayor etc. of Mobile*, 30 Id. 564. A city is not liable for mere inconveniences occasioned to adjacent lot-owners by the regrading of a street: *Keasy v. City of Louisville*, *supra*. The doctrine of *Green v. Borough of Reading* on this point, was approved and followed in *O'Connor v. Pittsburgh*, 18 Pa. St. 189, and *Smith v. Corporation of Washington*, 20 How. (U. S.) 149, which were both cases of injuries occasioned by the regrading of streets. The doctrine was also applied in *Mayor v. Randolph*, 4 Watts & S. 516, where it was ruled that wherever a corporation has authority to grade a street it has power to do whatever is necessary for that purpose. It is approved also in *Commissioners v. Wood*, 10 Pa. St. 96, and in *Shaw v. Crocker*, 42 Cal. 438. In the latter case it was decided that a street contractor employed in making street improvements under the lawful authority of a corporation is not liable for

1. *Leader v. Moxton*.

2. *Goodloe v. Cincinnati*; 5 C., 22 Am. Dec. 764.

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3. *Barron v. Baltimore*, 7 Pet. 242.

4. *Barter v. Commonwealth*.

injuries thereby occasioned to adjacent property holders, where there is no negligence or want of skill. And generally it is laid down in *Railroad Co. v. Yeiser*, 8 Pa. St. 375, citing the principal case, that wherever an injury complained of is the result of the doing of a lawful act, negligence is the gist of the action. In *Mifflin v. Railroad Co.*, 16 Id. 194, the case is referred to as recognizing the principle that the owner of property has a right to put it to profitable use, although it may involve incidental injury to a neighbor.

FARMERS AND MECHANICS' BANK v. EGE.

[9 WATTS, 436.]

PURCHASER OF LEASED PROPERTY ON EXECUTION AGAINST THE LESSOR, is not entitled to rent paid in advance after the rendition of the judgment, in accordance with a stipulation in the lease.

PURCHASER ON EXECUTION MAY DERAFFIRM LEASE of the premises executed after the rendition of the judgment under which he purchased, by giving the tenant notice to quit, but if he does so he is not entitled to rent.

ERROR to the special court of common pleas of Cumberland county, upon an issue directed to try the right to the proceeds of certain property of one Perdue, which had been sold on execution, the plaintiff claiming the same in payment of the rent of certain premises of which Perdue was tenant. Verdict and judgment for the defendant under direction of the court. The facts sufficiently appear from the opinion.

Grimshaw and Alexander, for the plaintiff in error.

Watts, for the defendant in error.

By Court, ROGERS, J. The money now in court for distribution arises from the sale of the personal estate of Mentor Perdue, who was the tenant of George Ege, under a lease from the Mount Holly iron works, dated the twenty-fifth of February, 1837, for five years, at the annual rate of six thousand dollars, payable in advance on each successive first of April. The Farmers and Mechanics' bank purchased the premises at sheriff's sale, and on the twenty-fourth of August, 1839, the sheriff of Cumberland county acknowledged the deed. The property was sold on a judgment of the bank against Ege, entered in April, 1820. The bank claims the rent which accrued from the first of April, 1839, and relies on the one hundred and nineteenth section of the act of the sixteenth of June, 1836: "If any lands or tenements shall be sold upon execution, as aforesaid, which, at the time of such sale, or afterwards, shall be held or possessed by a tenant, or lessee, or person holding or claiming to hold the same under the defendant on such execu-

tion, the purchaser of such lands or tenements shall, upon receiving a deed for the same, as aforesaid, be deemed the landlord of such tenant, lessee, or other person, and shall have the like remedies to recover any rent or sums accruing subsequently to the acknowledgment of a deed to him, as aforesaid, whether such accruing rent may have been paid in advance or not, if paid after the rendition of the judgment on which sale was made, as such defendant might have had, if no such sale had been made." The purchaser is placed in the situation of the original landlord, with the like remedies, with a provision (which could not form part of the original bill) that he should be entitled to the accruing rent, even if paid in advance, provided it was paid after the rendition of the judgment on which the sale was made. To what class of cases does this clause apply? and what evils was it designed to remedy? and what is intended by the expression, "the payment of the rent in advance"? Can it apply when it is part and parcel of the contract that the rent should be so paid? Such a construction would be impolitic and unjust. For, suppose Perdue, in compliance with his contract, had voluntarily paid, or had been compelled by distress to pay the whole rent to Ege on the first of April—could it enter into the minds of the legislature, that he should be bound to pay it again, after the sale, on the judgment? How could he tell whether the bank would proceed on their judgment? You place him in this perilous predicament. If he does not pay, he is liable to a distress, and if he discharges his obligation with punctuality and good faith, according to his contract, he does it at the risk of being compelled to pay it again at the option of the creditor. But what was the mischief this clause was designed to reach? It strikes me it was intended to avoid the fraud and collusion which may arise either from payment, or the allegation of the payment in advance, where the rent was not, by the terms of the lease, due. The words of the court are, "whether the accruing rent may have been paid in advance." In advance of what? Why clearly in advance of the time when the rent became due. The legislature supposed, that where a judgment was rendered, and the tenant chose to anticipate his payments, it must be done at his own risk, and in this, as it is done voluntarily, there is nothing of which he can complain. But where the payment is made in compliance with the contract, and there is no danger of either fraud or collusion, it does not call for so extraordinary a remedy. They surely could not intend to prohibit such agreements, nor could they have designed to

prevent the tenant from fulfilling his contract with said bank. It moreover seems to me, that this, by any fair construction, can not be viewed as a rent accruing after the acknowledgment of the sheriff's deed. The rent, according to the terms of the deed, accrued, or was due (which I take it is the same thing), before the acknowledgment. We feel a just reluctance to wrest words from their ordinary import to give them a construction which would lead to a violation of good faith, and in many cases would operate so unjustly.

The lease between Ege and Perdue was dated the twenty-fifth of February, 1837, but the judgment on which the land was sold was entered in April, 1820. The purchaser, therefore, had the right to affirm or disaffirm the lease. It seems clear, that he elected the latter, and if so, what right has he to rent which he can only claim in quality of landlord? Before the expiration of the lease, he gave notice, as he had a right to do, to Perdue, to quit, and moreover sued out a writ of estrepement to prevent waste. The latter was an equivocal act, but connected with the former, it removes all doubt as to the intention of the bank.

Judgment affirmed.

RIGHTS OF EXECUTION PURCHASER OF PREMISES under lease to a third person as to recovery of rent from the tenant: See the note to *Jackson v. Ramsey*, 15 Am. Dec. 251. Where the premises are leased to another by the debtor after execution, the purchaser may recover possession notwithstanding such lease, and the tenant is not entitled to notice to quit: *Locke v. Coleman*, Id. 118. In *Hemphill v. Tevis*, 4 Watts & S. 541, *Farmers etc. Bank v. Ege* is cited to the point that a purchaser on execution giving notice to quit to a tenant under a lease subsequent to the lien of the judgment disaffirms the lease, and the tenant's remaining in possession will not renew it. In *Fullerton v. Schaffer*, 12 Pa. St. 221, the case is also approved on the point that one purchasing leased premises on execution between rent days is not entitled to the rent for the current term where it has been paid in advance under the lease.

CUMBERLAND VALLEY R. R. CO. v. BAAB.

[9 WATTS, 458.]

SUBSCRIPTION OF MONEY TO INDUCE RAILWAY COMPANY TO LOCATE BRIDGE at a particular point constitutes a valid contract.

ERROR to Dauphin county common pleas, in an action brought to recover a certain sum subscribed by the defendant upon a subscription paper, whereby the subscribers promised to pay to the plaintiffs the sums severally subscribed for the purchase of one or more depots near Mulberry street, Harrisburg, if the

plaintiffs would locate their railroad bridge across the Susquehanna river, "opposite to Mulberry street, Harrisburg," the plaintiffs having built their bridge at the point indicated, and purchased a lot for a depot. The charter of the plaintiffs authorized them to construct their road from Carlisle, "by the nearest and best route, to a point on the Susquehanna river, at or near the borough of Harrisburg." By a supplementary act the plaintiffs were authorized to construct a bridge over the Susquehanna, at the eastern end of their road, to connect with the Pennsylvania canal, the connection to be formed "in accordance with the directions of the canal commissioners," etc. They were also authorized, if necessary to increase the capital stock, to increase the number of shares. Verdict for the defendant under the direction of the court, on the ground that the agreement was without consideration, and contrary to public policy. Judgment on the verdict, which the plaintiffs now sought to reverse.

McCormick, for the plaintiff in error.

J. A. Fisher, for the defendant in error.

By Court, GIBSON, C. J. The decision in *The Hibernia Turnpike v. Henderson*¹ [11 Am. Dec. 593], turned on the construction of a statute. The contract of subscription was regulated by the act of incorporation, in the interpretation of which it was held, that the public interest was so much concerned in the scheme that prompt payment of the installment, which was required to be counted down at the time of subscription, could not be dispensed with by the commissioners, or subsequently by the company: the contract before us is regulated, or expressly prohibited, by no statute whatever. It certainly was held, that the public had an interest in the question of location which it was the purpose of the legislature to protect by excluding fictitious subscriptions; and to preclude an improper influence from being gained by means of them in the election of the first board of managers, was assigned as the motive which induced the legislature to insist on immediate payment of a part of the subscription as a stake in the company's concerns. The object evidently was to prevent a choice favorable to the interests of influential proprietors on the proposed route, but prejudicial to the interests, not only of the company, but of the state, which also was a stockholder, and we were constrained by these considerations to enforce the condition of payment with extreme rigor. But it was not intimated that if present payment of a part of the

subscription had not been expressly exacted by the statute, the public interest would nevertheless have made it indispensable to the legality of the contract. It is here that a corporation being *ens legis*, has no inherent power to act, or indeed any power at all beyond what is necessary to accomplish the end of its being: but it is also true that within the scope of its legitimate functions it may act as a natural person might. In defining its powers, it would be impracticable to enumerate them specifically, or to do more than circumscribe the field of its action, leaving it to exercise all those that are incidental and necessary to the purpose of its creation. Now to fix the terminus of a road or the site of a bridge, when that has not been done by the act of incorporation, is certainly an incidental power; and did we recognize any other limitations of it than those that are expressed in the charter, we should fall into a labyrinth of contradictions and doubts. The conditions of the contract of subscription were expressly prescribed in *The Hibernia Turnpike v. Henderson*¹ [11 Am. Dec. 593], and *Irvin v. The Susquehanna and Philipsburg Turnpike*² [23 Am. Dec. 53]; in the latter of which it was said that, though an expectation of benefit to the holders of property contiguous to the route had been a powerful spring in putting these artificial bodies in motion, yet that it had never been suffered to become a condition of the contract of subscription. In the case at bar, the subscription is not to the stock: and there is consequently no express regulation or prohibition of it in the charter; without which the supposed resemblance of it to the cases quoted, is barely imaginary.

In *Irvin v. The Susquehanna etc. Turnpike* the rights of the corporators were declared to be inviolable: but the public interest was said to be paramount to everything else. If, then, the right to determine a question of location is a corporate one, it is paramount even to the public convenience; and there is abundant reason that it should be so. A company is not bound to make the best road, and upon the best ground that can be had by an unlimited outlay: it is enough for the public that it does the best it can with its means. The sum subscribed is usually inadequate to the end, and it would surely not promote the public convenience to preclude recourse to any other means which might be put by accident within its reach. As inducements to the undertaking, contributions on the ground of individual, as well as of corporate interests, may be legitimately calculated

1. 8 Serg. & R. 219.

2. 2 Penn. 466.

upon. Without the purchased assistance of a part of the inhabitants of Harrisburg, this company might possibly have been unable to construct any bridge at all; and how public convenience would have been promoted by interdicting the use of it, is a mystery which it would be hard to penetrate. To say that the competitors for the location might equally have encouraged the work by subscription to the capital stock, is to say nothing. For its own sake they were not disposed to encourage it at all; and we should ask too much did we require the company to forego the power given to it by its position of procuring assistance in compensation of equivalent advantages bestowed. Nor is it to be inferred from the clause which allows of an increase of the capital by an increase of the shares, that it was intended to prohibit an increase of it in any other way. That is an enabling, not a disabling clause, its object being to enlarge the sphere of the company's action for general purposes, not to restrain it in a particular thing. And a subscription of additional shares to the stock would have directly given the subscribers that very influence in the direction of the company's affairs, which has been so earnestly deprecated. The election of managers by means of a fictitious subscription, is certainly an evil which the legislature, in the cases quoted, wisely interfered to prevent; but to be allowed to do the best for the company's welfare by the use of every means not expressly interdicted, is one of the conditions on which the stockholders subscribed their money, and it is one by which the public will not be found to suffer; for managers will doubtless have sufficient sagacity to see that the location which best serves the public is that which will give the company the greatest run of customers. It is most politic, therefore, to let such a company manage its affairs according to the dictates of its interest. Its managers will doubtless select the best route and occupy the best positions in order to enjoy the present advantages of them, as well as to preclude future competition; and for that reason, the interest which the state has in the work may safely be committed to their direction. We can not say, therefore, that the contract on which this action has been brought is illegal on grounds of public policy.

Judgment reversed, and a *venire de novo* awarded.

SUBSCRIPTION TO CORPORATION FOR LOCATION OF PUBLIC ROAD, effect of: See *Irvin v. Turnpike Co.*, 23 Am. Dec. 53. A subscription for the erection of a state-house is not void for want of consideration or as against public policy. *State Treasurer v. Cross*, 31 Id. 626.

McLANAHAN v. REESIDE.

[9 WATTS, 508.]

RECORD OF ABSOLUTE DEED IS NOT NOTICE TO CREDITORS of the grantee subsequently obtaining judgment, of an agreement not referred to in the deed, but executed between the grantor and grantee on the same day and recorded at the same time in the same book, that certain notes given as security for the purchase money, are to be considered a lien upon the premises in the nature of a mortgage.

AGREEMENT IN NATURE OF MORTGAGE NEED NOT BE RECORDED IN MORTGAGE BOOK, it seems, under the Pennsylvania recording act, but may be recorded in the book of deeds, the keeping of separate books being merely for the recorder's convenience.

MORTGAGEE PURCHASING THE PREMISES ON EXECUTION against the mortgagor, must look to the land and not to the purchase money for payment of his mortgage, under the Pennsylvania statutes; so, where the purchaser's rights depend upon an agreement constituting a "lien in the nature of a mortgage."

ERROR to the Bedford county common pleas in an amicable action to try the right of the plaintiffs and others, as judgment creditors of one Lewis, to have payment of their judgments out of the proceeds of certain land sold on execution in favor of the plaintiffs in preference to a claim of the defendant under a prior agreement with Lewis in the nature of a mortgage. From a statement of the facts in the nature of a special verdict, it appeared that an agreement under seal had been entered into between the present defendant and the said Lewis, whereby the defendant agreed, for a consideration therein expressed, to sell and convey, and did thereby sell and convey, certain land to Lewis, covenanting to execute a warranty deed therefor at or before the sealing of the agreement. The agreement acknowledged payment of the consideration by the receipt of certain notes held by Lewis against other persons, and provided that the said notes "for the payment or security of money" should "be and remain chargeable" upon the land and "to be considered a lien and in the nature of a mortgage" thereon until the money due on the notes was fully paid. On the same day an absolute warranty deed in fee, not referring to the agreement, was executed by the defendant, conveying the premises to Lewis, and both instruments were on the same day recorded in a book called the "deed book," and not in a "mortgage book" admitted to be kept in the recorder's office for the recording of mortgages. The plaintiff's judgment against Lewis, on which the land was sold, was subsequently recovered and docketed in the common pleas, and the defendant afterwards recovered and had

docketed in the same court a judgment for a balance remaining unpaid on the notes above mentioned. Judgment for the plaintiffs, which the defendant now sought to reverse.

Oline, for the plaintiff in error.

Blodget, for the defendant in error.

By Court, GIBSON, C. J. This case is not exactly like *Friedley v. Hamilton*, 17 Serg. & R. 70 [17 Am. Dec. 638], in which a recorded conveyance and an unrecorded defeasance, constituting an unrecorded mortgage betwixt the parties, were postponed to a subsequent judgment. But though both have been recorded in this instance, the principle applicable to them is the same. They were recorded in the same volume, on the same day, and though it does not expressly so appear, most probably in juxtaposition. But a creditor in search of a clew to the title, would necessarily stop at a conveyance absolute on the face of it, and referring to nothing beyond it. He would have no reason to suspect that further search would lead to a defeasance of which, not lying in the channel of the title, he would not, though actually recorded, be bound to take notice; as was held in *Woods v. Fumere*, 7 Watts, 385 [32 Am. Dec. 772]; for a purchaser of a regular chain of title is not bound to notice a thing which is not ostensibly attached to any part of it, as in *Ripple v. Ripple*, 1 Rawle, 886,¹ where a charge by the will of a deviser who had purchased by articles for his son, to whom the land was conveyed by the original owner after the testator's death, was held to require actual notice of it, in order to affect a purchase under a judgment against the son. The difference betwixt that case and the case at bar, is that here the incumbrance is of record, and there it was not; but according to *Woods v. Fumere*, if the record of the incumbrance lay not in the creditor's way, he was not bound to notice it. It is indeed of no account that the conveyance and the articles were not recorded in the book set apart for mortgages. The keeping of such a book is an arrangement to promote the convenience of the officer, by contracting the surface over which he is to search for a particular thing; and he is bound to furnish precise information, get it as he may, of every registry in his office, whether made in the right place or not. Nor is it material, on the other hand, that they were recorded in the same volume, or side by side. The creditor may have actually seen no more than the absolute conveyance, which, referring to no other deed *in pari materia* as a part of it, would

1. 1 Rawle, 886.

direct him to nothing beyond it. Nor is this merely theoretical. For what would a creditor in such a case direct a search? Undoubtedly for that which is usually the consummation of all bargains and stipulations; and when the registry of it is put before him, without leading him to a suspicion of aught beside the existence of an absolute conveyance, might he not justifiably rest satisfied of the clearness of the title? By allowing his eyes to range over the adjoining pages, in this instance, they might possibly have fallen on the registry of the articles; but the legal effect of their registration would be the same, were the place of it in another part of the book, for a question of constructive notice is not to be determined by the probability of actual notice. It is of the last importance to creditors that the registry of a mortgage, by which they are to be affected, whatever the form of the transaction between the parties, should exhibit as a whole, connected and perfect in its parts.

But even were the registry of these two deeds taken as such, how could it benefit the case of the defendant below, who, as a purchaser subject to his own mortgage, as he must be deemed by force of the statute of 1830, must look, not to the purchase money, but the premises in his own hands? The agreement subjoined to the articles, if it did anything, turned the conveyance into a mortgage to secure the payment of the notes given for the purchase money. What is "a lien in the nature of a mortgage," but a mortgage itself? It is hard to conceive of a lien, simply, without a means to enforce it; yet I will not say there may not be such a thing. But if the agreement in this case be not deemed a defeasance of the conveyance, and both together as constituting one instrument, then the registration is incontestably several, and the creditor would be bound to look no further than the conveyance: so that in either aspect, the defendant below had no right to any part of the purchase money.

Judgment reversed, and a *venire de novo* awarded.

IRREGULARITIES IN RECORDING INSTRUMENTS: See *Sawyer v. Adams*, 30 Am. Dec. 459, and the note thereto. In *Miller v. Musselman*, 6 Whart. 358, the principal case is cited for the general doctrine that third persons are bound by an instrument requiring to be recorded only as it is recorded, whatever may be the transaction between the parties, and whatever agreements they may have entered into.

DEED ABSOLUTE WITH DEFEASANCE, HOW AND IN WHAT BOOK RECORDED.—Failure to record a defeasance accompanying an absolute deed postpones it even as a mortgage to that of a subsequent judgment: *Friedley v. Hamilton*, 17 Am. Dec. 638. An absolute deed with a defeasance should be recorded in the book of mortgages: *Grimstone v. Carter*, 24 Id. 230. See, also, to the same purpose, *James v. Morey*, 14 Id. 475, and note.

BROWN v. MCKINNEY.

[9 WATTS, 565.]

POSSESSION FOR TWENTY-ONE YEARS BY A FENCE AS THE LINE, or by a house or stable, by a party claiming the land as his own, conclusively establishes his right, whether he knows of an adverse claim by the adjoining owner or not.

ERROR to Dauphin county common pleas. The case is stated in the opinion.

Rawn, for the plaintiffs in error.

Johnston and Ayres, for the defendant in error.

By Court, HUSTON, J. The plaintiffs in error were plaintiffs below, and brought this ejectment as is stated in the writ for the fortieth part of an acre, more or less, being part of lot No. 295 in Harrisburg, bounded, etc. The plaintiffs deduced title to lot No. 295. On the west it was bounded by lot No. 294. On this lot and on the side next to 295 stood a house built more than thirty years ago. There was no objection to the plaintiff beginning at this house and measuring his distance along the street. The front of each lot on the street was fifty-two feet six inches: this they had, but insisted on more, on the following grounds: They alleged and proved by James Pople that by going to the east side of lot 294 and allowing it fifty-two and one half feet, and then measuring Brown's lot fifty-two and one half feet, he fell about five inches short of where the fence between plaintiffs' and McKinney's lots stands now; he had reason for measuring lot 294. The owner of that lot has his east line fixed by his house adjoining plaintiffs' lot, which house has stood more than thirty years: at the side of that house the measurement ought to have begun. But this is not all; he then went two lots east, and he measured those lots, and again fell five inches short of the fence. This is his testimony, but I believe he was not understood—for he says afterwards that this throws the fence five inches on the plaintiffs' lot. The sum of the matter is, the plaintiffs suppose there are four or five inches more in the front of lots 295, 296, and 297, than they call for, and he wanted the whole or at least one third of this overplus measure. This is no new thing to me; although it is not common in town lots, it is very common in tracts of land, and we every year in former times met with a man who, if he thought his neighbor had some overplus land, wished to take some of it into his own care; and we have cases where very accurate measures have occasioned

very unprofitable law suits, of which the *Cherry Alley case*, in 7 Watts, is an instance. But James Pople measured with a ten-foot pole, and measured four lots instead of one, and there is no evidence that even then he began at the proper points.

Colonel Roberts, who I understand is a regulator in the borough, went out at the adjournment of the court, and he found that measuring from the house on 294 to the fence between plaintiffs and McKinney's, plaintiffs have their full distance; but to understand the points proposed to the court and the errors assigned, we must go back. Plaintiff showed that Jonathan Keanly owned the lot more than twenty years ago, and rented to several persons in succession until the plaintiffs bought it in 1838; the plaintiffs also proved by a witness that many years ago there was a ball-alley on McKinney's lot, and to enlarge it an agreement was made for permission to move the fence in on the lot in question nearly four feet; this was only the breadth of the ball-alley; that the person who occupied McKinney's lot agreed to pay and did pay two dollars a year rent for this ground: it was also proved by plaintiffs' witnesses, that there had been a fence between the plaintiffs' lot and McKinney's which had stood in the same place more than twenty-one years; but this fence was not straight; that about half way back on McKinney's lot, stood an old frame stable. It was also proved by plaintiffs' witnesses that soon after this suit was commenced the parties took the regulators of the borough to the lots, who with a standard pole measured off to plaintiffs fifty-two feet six inches, and marked the point. That McKinney, who did not live on this lot, but a long distance from it, had his fence moved to this line; that he moved his stable some distance in on his old lot, and moved the crooked fence which had given him possession of a small part of plaintiffs' lot since before Keanly bought it—in short, that he gave up all to the line fixed by the regulators. After this, in April, 1839, he by leave of the court filed a disclaimer as to every part of lot No. 295. But plaintiffs would not stop their proceedings. It appeared that Zearing joined McKinney's two lots on the east, and when McKinney was improving on that side, he and Zearing had agreed on a point as the line between them, without inquiring whether this was the true point, or whether Zearing had not given up a few inches to McKinney. The plaintiffs, as I stated before, went and measured McKinney's two lots, and found five inches of overplus, and this suit was continued. It has always been the wish of McKinney to stop the contest and

for this purpose he had moved his stable and his fence, and give plaintiffs what he could have held by the statute of limitations. For it can not be disputed that an occupation up to a fence on each side by a party or two parties for more than twenty-one years, each party claiming the land on his side as his own, gives to each an incontestable right up to the fence, and equally whether the fence is precisely on the right line or not. It is time that it should be settled beyond dispute that where a person is in possession by a fence as his line, or by a house or stable, for more than twenty-one years, his possession establishes his right. A possession claiming as his own is in law and reason adverse to all the world—and as much so if he has never heard of an adverse claim as if he had always known of it.

Judgment affirmed.

ADVERSE POSSESSION: See the note to *Wright v. Guier*, ante, 108, and the note thereto, referring to previous cases in this series. As to the settlement of a boundary between lands of adjacent owners by long acquiescence, see *Jackson v. McConnell*, 32 Am. Dec. 439; and *Crowell v. Bebee*, 33 Id. 172, and cases cited in the notes thereto, referring to prior cases in this series.

HARVEY v. THOMAS.

[10 WATTS, 63.]

COURT NEED NOT CHARGE UPON POINT NOT ARISING upon the evidence.

VERDICT UPON WHICH NO JUDGMENT IS ENTERED, assessing the damages which a party will sustain by reason of the laying out of a lateral railroad across his land, under the Pennsylvania statute of 1832, will not justify an entry and the making of the road, but the record of the proceedings is admissible in evidence to mitigate the damages.

PENNSYLVANIA ACT AUTHORIZING APPROPRIATION OF ANOTHER'S LAND FOR LATERAL RAILROAD to connect a private coal mine with a public river or other highway is constitutional, and the act does not require the petitioner to own the land at the point of junction.

RIPARIAN OWNER'S RIGHT OF EXCLUSIVE POSSESSION TO THE SHORE of a navigable stream does not extend beyond low-water mark.

PART OF RECORD, WHERE REMAINDER IS SHOWN TO HAVE BEEN LOST, is admissible in evidence, with parol proof of the contents of the part lost.

ERROR to Luzerne county common pleas, in an action of trespass *quare clausum fregit*, brought to August term, 1839, by Harvey against Thomas. The trespass complained of consisted in entering upon the plaintiff's land, and constructing a lateral railroad, under the act of May, 1832, to connect the defendant's coal mine with public navigation. The defendant, it appeared, by petition under the act procured the appointment of viewers,

who reported the damages which the plaintiff would sustain from the making of the road. Upon appeal by the plaintiff, the damages were assessed by a jury in 1835. No judgment was entered on the verdict. The petitioner, however, entered and constructed the road. Subsequently, in November, 1839, the court, on the petitioner's application, directed judgment to be entered as of August 3, 1839, when the jury fee was paid, and the petitioner brought the amount found by the verdict and paid it into court, having previously tendered it to the plaintiff. It appeared that the record of the proceedings above mentioned was lost, except the docket entry, which was admitted in evidence with parol proof of the contents of the part lost, against the plaintiff's objection. The plaintiff asked instructions in substance as follows: 1. That there being no judgment on the verdict, the proceedings above set out did not justify the acts complained of; 2. That the road must have been made on the precise line specified in the petition; 3. That the defendant could not occupy the plaintiff's land at the terminus of his road; 4. That the statute was unconstitutional, and if not, that it did not apply where the petitioner owned no landing-place at the terminus. The instructions of the court on these points sufficiently appear from the opinion. Verdict and judgment for the plaintiff for twenty-five dollars and costs, and the plaintiff brought error.

Campbell and Butler, for the plaintiff in error.

Wright and Woodward, for the defendant in error.

By Court, GIBSON, C. J. It is proper, *in limine*, to say, that as no part of the evidence has come up with the record except what is contained in the bills of exceptions, we know not whether tender was made before or after judgment, or whether the point propounded in the first prayer arose in the cause at all. If it did not result from the evidence, the judge might omit to charge on it; and as error is not to be intended, we would have been bound, had he not noticed it, to suppose that it had not a legitimate place in the cause. But he did notice it, and gave the direction prayed for, with a very proper qualification, that though the proceeding in the common pleas did not furnish a justification of the trespass, it at least took away all pretext for vindictory damages. And the same may be said of the second prayer, which was answered affirmatively, by directing that if judgment had been entered on the verdict, if tender had been made in pursuance of it, and if the road had been

constructed according to the requisitions of the act, there would have been a full and perfect defense; for from this the jury must have inferred that there could be no defense without the concurrence of all of them. Besides, any omission on this head could do the plaintiff no harm, for the jury actually found for him; and everything beyond that had relation to the quantum of the damages. On that ground alone, an error, if there were one, would be immaterial.

The third prayer was properly rejected. Nothing in the statute or in reason, requires a petitioner to be the owner of the land at the entrance of the route into the public thoroughfare. It was not contemplated that he should have a depot at the junction; and there is neither reason nor enactment for the plaintiff's principle. The road might, therefore, be lawfully laid on the ground which it occupies; and as to intrusion, there is no evidence legitimately before us, nor is there anything even in that which has been put upon our paper books irregularly, to show that the defendant had occupied any part of the plaintiff's ground on the pool, or prevented him from using it as he pleased. The railroad was carried into the stream on a platform; whence the coals were discharged by a chute into boats lying parallel with the shore. What the intervening space was, it is not material to inquire: the plaintiff's right of exclusive possession extended not one inch beyond low-water mark, and if there was a trespass at all, it was committed on the public. An unreasonable occupancy of the pool might have subjected the defendant to a prosecution for a nuisance; but as to the plaintiff's right in it, the case stands on the principle of *Shrunk v. The Schuylkill Navigation Company*, 14 Serg. & R. 71. The defendant might occupy any part of the stream without being answerable to the plaintiff or any one else, for preventing boats from coming to lie at the landing.

The most material point in the cause is that which involves the constitutionality of the statute on which the defendant's right is founded; but it is one about which little need be said. If there is an appearance of solidity in any part of the argument, it is that the legislature have not power to authorize an application of another's property to a private purpose even on compensation made, because there is no express constitutional affirmance of such a power. But who can point out an express constitutional disaffirmance of it? The clause by which it is declared that no man's property shall be taken, or applied to public use, without the consent of his representatives, and with-

out just compensation made, is a disabling, not an enabling one; and the right would have existed in full force without it. Whether the power was only partially restrained for a reason similar to that which induced an ancient law-giver to annex no penalty to parricide, or whether it was thought there would be no temptation to the act of taking the property of an individual for another's use, it seems clear that there is nothing in the constitution to prevent it; and the practice of the legislature has been in accordance with the principle, of which the application of another's ground to the purpose of a private way, is a pregnant proof. It is true that the title of the owner is not divested by it; but in the language of the constitution, the ground is nevertheless "applied" to private use. It is also true, that it has usually, perhaps always, been so applied on compensation made; but this has been done from a sense of justice, and not of constitutional obligation. But as in the case of the statute for compromising the dispute with the Connecticut claimants, under which the property of one man was taken from him and given to another, for the sake of peace, the end to be attained by this lateral railroad law is the public prosperity. Pennsylvania has an incalculable interest in her coal mines; nor will it be alleged that the incorporation of railroad companies, for the development of her resources, in this or any other particular, would not be a measure of public utility; and it surely will not be imagined that a privilege constitutionally given to an artificial person, would be less constitutionally given to a natural one.

The competency of the docket entry, the other part of the record being lost, is incontestable. A part of a record may always be introduced on proof that nothing which can be had remains behind; and the proof of contents, to supply the place of the part lost, was as clearly competent.

Judgment affirmed.

COURT NOT REQUIRED TO CHARGE ON POINT WHERE NO EVIDENCE: See *Newman v. Foster*, 34 Am. Dec. 98. The court is never bound to answer abstract questions: *Irish v. Smith*, 11 Id. 648; *Porter v. Robinson*, 13 Id. 153; *Hathorn v. Stinson*, 25 Id. 228. It is error to leave a question to the jury upon which there is not a color of proof: *Riggin v. Patapeco Ins. Co.*, 16 Id. 302; *Whitehill v. Wilson*, 24 Id. 326; *O'Fallon v. Boismenu*, 26 Id. 678; *Stouffer v. Lashaw*, 27 Id. 297; *Prescott v. Union Ins. Co.*, 30 Id. 207.

EMINENT DOMAIN, WHAT USES JUSTIFY EXERCISE OF.—This subject is discussed in the note to *Beekman v. Saratoga etc. R. R.*, 22 Am. Dec. 686. See also *Whiteman's Executrix v. Wilmington etc. R. R. Co.*, 33 Id. 411, and *Lexington etc. R. R. Co. v. Applegate*, Id. 497, and other cases in this series cited in the notes thereto. In the note to *Beekman v. Saratoga etc. R. R. Co.*, before referred to, at page 696, the cases relating to the validity of the Penn-

sylvania "lateral railroad law," and to other similar statutes, are reviewed. The doctrine laid down by Gibson, C. J. in *Harvey v. Thomas*, that without an express constitutional prohibition the legislature may authorize the taking of private property for private use upon making compensation, is referred to with approval in discussing analogous questions in *Billings v. Hall*, 7 Cal. 22; *Sherman v. Buick*, 32 Id. 255; *People v. Gallagher*, 4 Mich. 250; *Sharpless v. Mayor of Philadelphia*, 21 Pa. St. 167. Doubted in 25 Iowa, 549.

RIPARIAN OWNER'S RIGHT TO SHORE OF NAVIGABLE STREAM: See *Ball v. Slack*, 30 Am. Dec. 278, and cases collected in the note thereto. See also *Hagan v. Campbell*, 33 Id. 267; *Valentine v. Piper*, Id. 715; *Bird v. Smith*, 34 Id. 483, and notes to those decisions.

PART OF RECORD, ADMISSIBILITY OF: See *Hampton v. Speckenagle*, 11 Am. Dec. 704, and note; *Baudin v. Roliff*, 14 Id. 181, and note; *Philipsen v. Bates*, 22 Id. 444.

PAROL PROOF OF LOST JUDICIAL RECORD: See *Read v. Staton*, 9 Am. Dec. 740; *Jackson v. Cullum*, 18 Id. 158; *Gentry v. Hutchcraft*, Id. 172; *Pruden v. Alden*, 34 Id. 51, and note. In *Woods v. Halsey*, 9 Pa. St. 145, the principal case is referred to as authority for the position that where executions are lost, docket entries are admissible in evidence.

EXEMPLARY DAMAGES FOR ENTERING UPON LAND TO BUILD RAILROAD without taking the steps prescribed by statute for the condemnation of the land, may be recovered if the act was malicious or oppressive; otherwise not: *Chicago etc. R. R. Co. v. Baker*, 73 Ill. 317, citing *Harvey v. Thomas*.

CARSKADDEN v. POORMAN.

[10 WATTS, 82.]

GENERAL ASSIGNMENT OF ERROR IN CHARGE OF COURT, without specifying the particular points in which it is erroneous, will be disregarded.

ENTRY IN FAMILY RECORD AS TO BIRTH OF CHILD IS ADMISSIBLE EVIDENCE in an action brought by the father against a justice for unlawfully solemnizing a marriage with such child while a minor, and the testimony of the father is admissible to prove such entry.

EVIDENCE OF CIRCUMSTANCES SHOWING FATHER'S PREVIOUS ASSENT TO MARRIAGE of his minor son is admissible in an action brought by the father against the justice who solemnized the marriage for the statutory penalty, but not evidence of subsequent conduct showing that the father was pleased with the marriage.

OFFER OF EVIDENCE SHOULD SPECIFY the purpose for which it is offered.

OBJECTION TO PROOF OF SERVICE OF NOTICE required by law in an action for a penalty for unlawfully marrying the plaintiff's minor child, that the copy served was not a true copy because it omitted the word "one" in the expression "twenty-one years," is too refined.

ERROR to Clinton county common pleas, in an action of debt, to recover a penalty from the defendant, a justice of the peace, for solemnizing a marriage with the plaintiff's minor son without the plaintiff's assent. The plaintiff having offered in evidence the notice required by law to be served before bringing the

action with proof of service, the defendant objected to it that the copy served was not a true copy because it omitted the word "one" in the clause "being under the age of twenty-one." The objection was overruled and the defendant excepted. The other facts are sufficiently stated in the opinion. Verdict and judgment for the plaintiff, and the defendant brought error.

Fleming, for the plaintiff in error.

Armstrong and Campbell, for the defendant in error.

By Court, ROGERS, J. The plaintiff assigns as error the admission of the testimony in the several bills of exception, and the charge of the court. As to the latter, it must be disregarded, as the general errors without a specification of the points relied on, give no information to the adverse party. This was an action to recover the penalty of fifty pounds from the defendant, the plaintiff in error, who was a justice of the peace, for marrying the son of the plaintiff, who was a minor, without the consent of the father. To prove that the son was a minor, which was essentially requisite, under the act, it was given in evidence by the testimony of Peter Poorman, the plaintiff, as follows: "This is my family bible; that record is the record of the births of my children; the entries are in my own handwriting; the entry of my son Henry's birth (the son alluded to) was made a day or two after the birth. It was truly made." The entry is, "Henry, born the fourteenth of January, 1818." The objections to the testimony are two: that the bible is not evidence of the time of the birth, though duly proved, and that it can not be proved by the oath of the party to the suit.

The first exception was not taken at the trial, and has been but little pressed in the argument here. Evidence of pedigree, of birth, and of death, is somewhat relaxed from necessity, and for these purposes entries in the register of burials, and the entries of the births and deaths of the members of the family, in a bible, are always given in evidence without objection. Indeed, without reverting to some such sources of information, it would be, in many cases, impossible to prove the pedigree, or the time, either of the birth or death, of obscure individuals. Experience has shown, that it is less exceptionable, and more to be depended on, than the frail recollections or memory of strangers, of such facts as are alone interesting to the parents, or the immediate members of the family.

But although there can be no doubt, that the entries, when duly proved, are evidence, yet it is not so clear, that the party

in interest is a competent witness to authenticate the book, and prove the entries. No case has been cited, nor is any known, where the point has been directly decided. It may be laid down as a general rule, that when the evidence is not to the court, but to the jury, the party in interest is not a competent witness; but this, though a general, is not a universal rule. In *Garwood v. Dennis*, 4 Binn. 326, it is said, "Necessity, either absolute or moral, is sufficient ground for dispensing with the usual rules of evidence." Thus in this country, from necessity, the party is competent to prove his book of original entries, and there would seem to be an equal necessity here. Without resorting to the testimony of the parents, it would be, in many cases, very difficult to authenticate the family record. It is believed, there is but little danger which can arise from such proof, accompanied, as it is, by the book itself, which is open to the inspection of the jury. An attempt to fabricate an entry to subserve a particular purpose, would be easily detected, and it is difficult to believe that there is anything to fear from a false entry, made at a distant period of time, to answer a contingent purpose. When entered at the time it purports to bear date, it is liable to no objection, and there is no evidence on which a jury would place more implicit reliance.

The defendant was permitted to give any evidence which tended to show the assent of the father to the marriage, or that he encouraged it; and for this purpose, he was allowed to prove, that the son's wife lived at the house of the father, previous to the marriage, that he knew he visited her, and that he, the son, thought a good deal of her. But they refused to admit evidence that since the marriage the father had put the son on a farm, and had expressed himself well satisfied and pleased with the match. In this the court have taken a sound and proper distinction. We can not perceive in what respect such testimony conduces to prove either an encouragement or a previous assent to the marriage. It is a matter of no sort of consequence, so far as any inquiry into the improper conduct of the justice is involved, whether the parent is well or ill pleased, or whether the match be good or bad. The act was intended to prevent clandestine marriages, and for this purpose has imposed upon the justice a proper penalty, for marrying or joining in marriage, any person under twenty-one, without the assent of the parents. It is intended as a punishment of the offender, rather than a compensation to the parent, and to make this depend on the fitness or unfitness of the match, would lead to indecent and worse

than fruitless inquiries. Nor is a good reason perceived, why the act should be eluded, because the kind and tender feelings of the parent induce him to receive into favor an erring child, and to supply him with the common necessities or comforts of life. Such testimony, by the encouragement it would give to angry passions, would produce infinite mischief, which the court, by their decision, have properly prevented.

The defendant further offered to prove, that the son communicated his marriage to his father shortly after it took place, and what he said about it. The offer was evidently too general. The defendant should have specified what was said, and if it tended to prove assent or encouragement, on the authority of the case of *Rodelsough v. Sands*,¹ 2 Watts, 9, it would have been evidence. But as it stands, it is but little more than the repetition of the offer of evidence, which in another shape had been properly rejected.

The objection to the notice is too refined, nor can we see anything in the charge of which the defendant has the slightest reason to complain. There is convincing evidence of every fact necessary to maintain the suit, viz., that the son was a minor, and that the defendant, who was a justice of the peace, joined him in marriage without the consent of his parents.

Judgment affirmed.

REGISTER OF BIRTHS AS EVIDENCE: See *Jackson v. King*, 15 Am. Dec. 468; *Woodard v. Spiller*, 25 Id. 139.

KASE v. JOHN.

[10 WATTS, 107.]

PURCHASER OF GOODS WITH WARRANTY CAN NOT RETURN the same and recover the price, on breach of the warranty, but must sue upon his warranty, if the vendor had no knowledge of the unsoundness, and does not consent to take the article back, and the contract itself reserves no right to return it.

RETURN OF ARTICLE BY PURCHASER FOR PURPOSE OF REPAIR, where it is defective, is not effective for the purpose of rescission, even though the vendor neglects to repair the article.

ERROR to Columbia county common pleas, in an action on the case in assumpsit. The case was, that the defendant had agreed for a certain sum to manufacture for the plaintiff a threshing-machine, warranted "to be good and to answer the intended purpose." The declaration contained three counts: 1. That the

1. *Rodelsough v. Sands*.

defendant agreed to make a machine which would answer the plaintiff's purpose, and was paid for it; but that he made it so unskillfully that it was useless. 2. That the defendant sold the machine with warranty, and received the price, alleging a breach of the warranty. 3. For money had and received. The contract, delivery of the machine, and payment were proved. There was contradictory evidence as to whether the warranty was broken or not. The machine broke when put in use, and the plaintiff returned it for repairs, the defendant not being at home. It was never repaired, and the plaintiff never took it away. The court instructed the jury, among other things, that if there was a breach of the warranty, and a return of the machine before suit, the plaintiff could recover the price; but if there was no return he could recover only the difference between the price and the value; that a return of the article merely for the purpose of being repaired was not such a return as would affect the right to recover, unless there was a refusal or neglect to repair it for an unreasonable time, in which case the plaintiff might elect to consider it returned and recover the price. Verdict and judgment for the plaintiff, and the defendant brought error.

Comley and S. Hepburn, for the plaintiff in error.

Greenough, for the defendant in error.

By Court, ROXBES, J. There is no objection to the charge of the court on the subject of warranty, except to so much of it as relates to the rescission of the contract. In *Corrone v. Henderson*,¹ 15 Mass. 319; *Hunt v. Sill*,² 5 East, 449, it was held that a purchaser, who is entitled to rescind a contract, must place the vendor *in statu quo* in order to recover the consideration paid. How far the plaintiff was in a condition to do this may be doubted. But be this as it may, there is another objection to the charge, which can not be easily answered, which is, that the article was not returned, if at all, with the consent of the vendor, and there is no evidence to prove that the vendor knew of the unsoundness of the article at the time he sold. In *Thorn v. Wynn*,³ 12 Wheat. 183, Mr. Justice Washington sums up the cases, and the result is this. If upon a sale with a warranty, or by the special terms of the contract, the vendee is at liberty to return the article sold, and offers to return it, it is equivalent to an offer accepted by the vendor, and in that case the contract

1. *Corrone v. Henderson*; 8 C., 8 Am. Dec. 103.

2. *Hunt v. Sill*.

3. *Thorn v. Wynn*.

is rescinded and at an end, which is a sufficient defense to an action brought by the vendor for the purchase money, or to enable the vendee to maintain an action for money had and received, in case the purchase money had been paid. The consequences are the same where the sale is absolute, and the vendor afterwards consents unconditionally to take back the property, because in both the contract is rescinded by the agreement of the parties, and the vendee as well entitled to retain the purchase money in the one case as to recover it back in the other. But if the sale be absolute, and there be no subsequent agreement or consent of the vendor to take back the article, the contract remains open, and the vendee is put to his action on the warranty, unless it be proved that the vendor knew of the unsoundness of the article, and the vendee tendered a return of it in a reasonable time.

Here it is an absolute contract of sale with warranty, and without any right reserved to return the article, nor is there any evidence either of the return of it, or any consent of the vendor to take it back. The whole evidence negatives any such idea, for the return was for purposes of repair, and not with any intention of rescinding the contract. The vendor was as much, and no more, bound to repair the machine as any other person would have been, and if there was any unreasonable delay in repairing it, the remedy is another way, and not by considering it as equivalent to a consent to rescind the contract, and thereby enable the vendee to consider the contract at an end. Here, then, was neither an express nor implied consent of the vendor to take back the article, nor any proof that the vendor knew that it was defective, and indeed, whether it was in truth, is a matter of much reasonable doubt. It depends much on the credit to be attached to the statements of the witness. It was doubted whether there be a difference between the manufacturers in this respect and other vendors, that the former might be presumed to know it was unsound, although such a presumption does not arise as to others. But I perceive no warrant for the distinction in this particular in any of the cases, and we think it would be mischievous to visit him with the consequences of fraud from a presumption which, in numerous cases, would be at war with the truth.

Judgment reversed, and a *venire de novo* awarded.

OFFER TO RETURN GOODS ON BREACH OF WARRANTY not necessary before bringing action: *Borrekins v. Bevan*, 23 Am. Dec. 85; *Fowler v. Williams*, 4 Id. 579.

RESCISSIO OF SALE FOR FRAUD: See *Fowler v. Williams*, 4 Am. Dec. 579; *Buffington v. Gerriah*, 8 Id. 97; *Rowley v. Bigelow*, 23 Id. 607. Generally, as to the vendor's right to rescind a sale for fraud, see the note to *Thurston v. Blanchard*, 33 Id. 702. That a contract can not be rescinded without mutual consent where the circumstances have been so altered by part execution that the parties can not be placed in *status quo*, is a point to which *Kass v. John* is cited in *Lyon v. Bertram*, 20 How. (U. S.) 155.

HORTON v. COOK.

[10 WATTS, 124.]

PROMISE TO PAY ANNUITY, IN CONSIDERATION OF FOREBEARANCE to sue the executors of the grantor thereof, binds the promisor, if the grantor was personally bound for its payment.

GRANTOR OF ANNUITY IN TERMS IS, PRIMA FACIE, PERSONALLY BOUND for its payment, from whatever fund payable, and the covenant to pay implied from such grant, can be rebutted only by a plain intent on the face of the instrument that the annuitant is to resort only to the specific fund.

ANNUITY TO ONE AS PURCHASER AND NOT AS BENEFICIARY should be construed as favorably towards the annuitant as the words will bear.

ERROR to the Northumberland county common pleas in an action of assumpsit brought by the administrators of Sarah Cook, deceased, to recover from the defendant the arrearages of a certain annuity due the intestate. It appeared that the husband of the said Sarah devised to her and to his son William, all his estate real and personal; that William conveyed a certain tract devised to him to a purchaser, and took from him a bond and mortgage to secure the payment of a certain balance of the purchase money, and that on the same an indenture was executed between the said William and the said Sarah, whereby the former, in consideration of certain rents due to the latter under her husband's will, and of the sum of one dollar, gave, granted, and confirmed to the latter for life, "one annuity or yearly income of three hundred and twelve dollars," to be paid, had, issuing, etc., out of the yearly interest of the aforesaid bond and mortgage, the said William for himself, his heirs, etc., authorizing and empowering the mortgagor, his heirs and representatives, to retain so much of the principal each year as would produce the interest required to pay the annuity, and to pay the said annuity annually, semi-annually, or quarterly, as he might think proper. The instrument further provided, that if the mortgagor should see fit to pay off the mortgage at any time, then the said William bound himself, his heirs, etc., to put at interest an amount sufficient to raise the annuity. The said William afterwards

departed this life after devising two thirds of his estate to his widow and the residue to his son. His widow intermarried with the defendant Horton. Sarah Cook, the plaintiffs' intestate, died leaving considerable arrearages of the annuity due her. It was further proved by the plaintiffs, against the defendant's objection, that the said defendant promised that, in consideration that the plaintiffs would forbear to sue the representatives of William Cook for the said arrearages, he would pay the same as soon as he could recover the mortgaged premises, and that the defendant and his wife did afterwards sue and recover on the mortgage, and that they bought in the land on execution and are now in possession. The defendant asked instructions to the effect that William Cook was not personally liable for said annuity, or at all events that he was not liable for any interest accruing after his death; that the defendant's promise was void for want of consideration, and that at most the defendant was liable only for such proportion of the claim as the whole bore to the amount for which the mortgaged property sold. These instructions were refused. It is not necessary to refer to the instructions asked or given on other points. Verdict and judgment for the plaintiffs, whereupon the defendant sued out this writ, assigning errors in the admission of the evidence above mentioned, and in refusing the instructions prayed for.

Greenough, for the plaintiff in error.

Donnel and Jordan, for the defendant in error.

By Court, GIBSON, C. J. If the grantor was personally bound for payment of the annuity, the promise to pay in consideration of forbearance to sue his executors, equally binds the defendant; and that is not controverted. It is urged, however, that what has been called an annuity, was no more than an assignment of a portion of the interest accruing on the bonds and mortgage. But the grant of an annuity in terms, out of whatever payable, *prima facie* binds the person; and the implication from it of a covenant to pay, can be rebutted only by a plain intent, apparent on the face of the instrument, that the annuitant should resort only to a specific fund. An annuity is an annual duty charged upon the person of the grantor only: Co. Lit. 441, b; but the grantee of a rent charge, which is not a pure annuity, may charge the land by a distress or an assize, or the person of the grantor by a writ of annuity, at his election: Litt., sec. 219. Now the grant, in this case, is stronger to charge the person, than the grant of a rent charge; for the sub-

ject of it is designated as an annuity in terms, and *ex vi termini*, the word imports the grant of a sum in gross, "so that no freehold be charged therewith:" Terms de Ley, 44; that is, as annuity; for it may certainly be charged on land in the shape of a rent. If it issue out of land, as by the modern practice it often does, the annuitant may make it personal or real, at his option; and though he may have a writ of annuity after a distress, he may do so only where he has not avowed in replevin, or brought an assize, which also is an election of record. But that the word annuity is the proper one to charge the person, is further manifest from the fact, that no writ of annuity lies for a rent created by reservation. It is said in the law dictionary, *verbo Annuity*, that there are few modern grants of annuities without a covenant for payment, express or implied; and that an action of covenant is usually brought instead of a writ of annuity, which is much out of use. What, then, is there to rebut the implication of such a covenant on the face of this instrument?

The annuitant was not a beneficiary, but a purchaser; and the interpretation is to be as favorable to her as the words will bear. Payment was directed to be made out of the produce of purchase money, secured by bond and mortgage, an adequate portion of the principal being left in the mortgagor's hands, or agreed to be put out at interest by the grantor, should it be paid over to him. If the grant then were construed to be only an assignment of the fund, it is evident that the grantee's security would be proportionately decreased; and it follows not that the designation of a particular fund for payment has the effect of discharging the grantor's responsibility. Such is the case of a rent charge, and such also was the case in 1 Roll. Abr. 227, of an annuity receivable out of a particular bag of money, or out of the grantor's coffers, or from a stranger. Besides, it is difficult to say what remedy this annuitant could have had against the mortgagor; or how, in a suit on the bonds, she could have recovered in the name of the obligee, just so much of the interest as would satisfy her annuity and no more; or how, in the event of the obligor's insolvency, which has since happened, she could have had repeated recourse to the land which has since been sold on the mortgage, and ceased to be a security for her demand. A construction that would expose her to the risk of such events, without recourse to any guaranty, would be plainly unreasonable and unjust. But that to find the means of satisfaction was to be the grantor's business, is evident from his covenant to put the principal at interest for her use, when it should be paid into

his hands. His being the hand to receive and pay out, she could look to no other. He might have put the money out on merely personal security, and not even of her choosing; on which it is unreasonable to suppose that she consented to rely. The grantor, then, having used apt words to charge his person, and having used none else to restrain their natural and technical effect, we must take it that he consented to be personally bound; and consequently, that there was a sufficient consideration for the defendant's promise.

Judgment affirmed.

FORBEARANCE TO SUE, AS CONSIDERATION: See *Hamaker v. Morley*, 4 Am. Dec. 477; *Sidwell v. Evans*, 21 Id. 387; *Noblet v. Green*, Id. 347; *Clark v. Russel*, 27 Id. 348.

PATTERSON v. LANNING.

[10 WATTS, 135.]

TENANTS IN COMMON TAKING BY DESCENT are regarded as coparceners under the Pennsylvania act of 1794.

WARRANTY OF TITLE IS IMPLIED IN PARTITION DEED between tenants in common taking by descent in Pennsylvania, and one of such tenants is not a competent witness for another in ejectment thereafter brought by the latter to recover his share of the land.

ERROR to Bradford county special common pleas in an action of ejectment. The only question was as to whether one Charles F. Wells, who testified for the plaintiff, was a competent witness, it appearing that the plaintiff and the wife of Wells, with others, were co-heirs at law of one Hollenbach, and as such co-heirs, were tenants in common of a large tract of land, of which the land now in controversy formed a part, which was allotted to the plaintiff by a partition deed executed by the co-tenants. The testimony was admitted by the court below. Verdict and judgment for the plaintiff, and the defendant brought error.

Baldwin, for the plaintiff in error.

Williston, for the defendant in error.

By Court, KENNEDY, J. If the tenancy in common, which existed prior to the deed of partition, made in this case, between the tenants, had been created by an act of their own, the decision of the court below, admitting Charles F. Wells, who, with his wife, one of the tenants in common in fee, was a party to the deed of partition, to testify as a witness on behalf of Mary Ann Lanning, the plaintiff below, another of the tenants in common,

and party also to the deed, would, according to the doctrine of this court, established in *Weiser v. Weiser*, 5 Watts, 279 [30 Am. Dec. 313], have been correct. But this was not the case. They acquired their respective interests in the lands, mentioned in the deed, which were thereby parted and divided among them, by descent or act of the law; in the same manner as parceners in England do by the rule of the common law. The act of 1794, which regulated the descent of real estates in this commonwealth at the time their ancestor died, cast the lands, which they subsequently, by their deed of partition, divided and apportioned among themselves, upon them, declaring that they should "inherit and enjoy the same as tenants in common in equal parts, in the same manner as if they were all daughters of the intestate." The same act also provided, that partition might be had at any time, of the lands, upon the application of one or more of them, by petition for that purpose to the orphans' court of the county within which the lands lay.

The course of proceeding for having the partition made, by setting apart and allotting to each, his or her proper proportion or purport, is also thereby prescribed; so that either one might compel it to be done at pleasure. In this respect, they would seem to have been placed upon the same footing, in regard to each other, as coparceners in England stood at common law. Parceners take by descent, which is an act of the law, as the tenants in common did in this case before they made partition; and as Lord Coke observes, "there is a diversity between a descent, which is an act of the law, and a purchase, which is an act of the party:" Co. Lit. 163 b. When the law bestows an estate, it is careful to provide the party with whatever may be requisite, not only to relieve him from any inconvenience which may attend his enjoying the estate, but also to secure him against any loss, as far as may be practicable, which may accrue in consequence of the relief granted; whereas in the case of an estate acquired by purchase, the law leaves the party to seek relief from such inconvenience, as shall be necessarily incident to his purchase, by his own exertion or act, and in his doing so to provide, if he wishes it, against any future loss which may accrue to him from the relief which he has gained. Thus, for instance, when any one or more of a number of parceners felt any inconvenience, arising from the united possession and enjoyment of the lands held in coparcenery, the law enabled him or them to compel the remaining parceners to make a partition of the lands. But in the case of joint tenants or tenants in com-

mon, they having become such by their own act, could not at the common law compel a partition. It was competent for them, however, to make partition by agreement. But then if they made partition without annexing an express warranty or condition to it, so that if any one of them should thereafter be evicted of his part, or any portion thereof, by a title paramount, he should have right to claim a new partition or compensation from the rest for his loss, the law would not imply anything of the kind, as it would in the case of parceners, who became invested with their rights to the land by act of the law. By virtue of the condition annexed, by implication of law, to a partition of lands made between parceners by consent or deed, if any one of them should be evicted afterwards from any part of her allotment, however small or insignificant, she might re-enter upon the other parceners or their heirs, and thus annul the whole partition; or she might, at her election, by virtue of the warranty annexed to the partition by law, vouch them when sued for her part or any portion thereof, in which case she would only be entitled to have a recompense for the part actually taken from her: Co. Lit. 174 b, 174 a; *Bustard's case*, 4 Co. 121; 4 Cru. Dig., tit. 32, Deed, c. 24, sec. 34. So if there be two coparceners of certain lands with warranty, and they make partition of the lands, the warranty shall remain, because they were compellable from the first to make partition: Co. Lit. 165 a, 165 b.

The law, however, is different as to joint tenants, who at the common law were not compellable to make partition; and hence if they hold their lands under warranty, and make partition thereof without writ, the warranty will be destroyed: Co. Lit. 187 a. And besides, it would seem as if the legislature intended, by the act of 1794, that the children of an intestate, dying seised of lands situate within the state, as also his other lineal descendants of a more remote degree, when nearest to him, at the time of his death, and standing in the same degree of relationship to him, should succeed to the lands by descent, and hold the same as coparceners, or else, why use, in the close of the second clause of the third section of the act, the following words: "Such estate shall descend, and be distributed to the said several persons, as tenants in common, in equal parts, however remote from the intestate the common degree of consanguinity may be, in the same manner as if they were all daughters of the person dying intestate." The words here, "in the same manner as if they were all daughters," may, very fairly, I think, be regarded as having a reference to the manner

in which lands descended to coparceners in England, according to the rule of the common law; for by it, two or more daughters there, being the only issue of the intestate, at the time of his death, his lands descended to them as parceners; that is, each taking an equal interest therein, with a right to compel partition: Lit., sec. 241; 1 Inst. 164 b. The words just recited were no doubt used in contradiction to the rule which governed in the case where the issue consisted of sons, or sons and daughters, which was, that the eldest son in being at the time of the death of the ancestor, took the whole of the lands by descent. It is true, however, that these words seem by their position to be placed in immediate connection with the second clause of the section, which provides for the lineal descendants of the intestate, standing in equal degree to him, but in a more remote one than children; and therefore might be said, not to be applicable to the first clause, which embraces the children only of the intestate. But as no sufficient reason can, I apprehend, be given why the legislature should have designed to make a distinction in this respect, between the children and the more remote issue, in a direct line of the intestate, the words may be considered as explanatory of the manner in which it was intended either should hold the lands. The parties, therefore, to the deed of partition given in evidence here, must be considered as resembling coparceners in many respects, at least, if not in all. They acquired the lands by descent or act of law, as coparceners do in England; and by the same law under which they acquired the lands, they were rendered liable to make partition of them. So in regard to the privity that existed between them, it would seem to have been threefold, as in the case of coparceners: 1. In estate; 2. In person; and 3. In possession; and not like, as it is between tenants in common created by their own act, where there is no privity except that in possession: Co. Lit. 169 a.

Seeing, then, they were created tenants in common by the act of the law, without any act whatever of their own, and that the same law also rendered them liable to make partition at the will and pleasure of any one or more of their co-tenants, it would therefore seem to be right, not only on the ground of analogy, that a partition having been made between them by deed, the same warranty and condition should be considered as annexed by law thereto, as if they had been parceners, but likewise on the ground of reason, it would seem to be requisite that they, as also tenants in common, created in this state by our law of

descents, should be regarded as coparceners, in order that their partition, by deed, of the lands held in common by them, shall not have the effect of destroying any previous warranty made, securing the lands to their ancestor, as might, perhaps, be the case, were they to be considered in the light of tenants in common created by purchase. We therefore think, that Charles F. Wells was interested in the event of this action, in favor of the party who called him, and that the court below, for this reason, erred in permitting him to testify in her favor.

Judgment reversed, and a *venire de novo* awarded.

WARRANTY IMPLIED ON PARTITION, WHEN: See *Feather v. Strohecker*, 24 Am. Dec. 342; *Venable v. Beauchamp*, 28 Id. 74; *Weiser v. Weiser*, 30 Id. 313, and note. The doctrine of the principal case is followed on this point in *Seaton v. Barry*, 4 Watts & S. 185.

PHILLIPS v. GREGG.

[10 WATTS, 158.]

MARRIAGE VALID BY THE LAW OF THE PLACE WHERE CELEBRATED is valid everywhere, and if invalid there is invalid everywhere; but to the latter part of this rule there are exceptions, as in certain cases where marriages between citizens of one country, while in another, may be celebrated according to the laws of their own country.

FOREIGN LAWS MUST BE PROVED AS FACTS, and will not be judicially noticed.

EVIDENCE TO PROVE FOREIGN LAW must be the best of which the nature of the case admits. Ordinarily, written laws of a foreign country must be proved by duly authenticated copies, and the unwritten law by the testimony of persons skilled therein; but this rule is not universal.

TESTIMONY OF PERSONS UNLEARNED IN THE LAW that prior to 1791 it was customary for protestant settlers in the Spanish colony of Mississippi to be married by a justice of the peace, under a regulation to that effect adopted by the governor or superintendent, is admissible to uphold a marriage so celebrated, unless the party objecting thereto shows that better evidence is attainable.

PURCHASE OF LAND BY A FATHER IN SON'S NAME is *prima facie* an advancement, but only to the extent of the sum actually paid by the father without regard to any subsequent rise in the value of the land.

POSSESSION BY TENANT IN COMMON IS NOT ADVERSE TO CO-TENANTS, so as to found a title by the statute of limitations, unless accompanied by circumstances unequivocally showing an adverse intent, such as a refusal, upon demand, to pay over the co-tenant's share of the rent.

ERROR to the Allegheny county district court, in an action of ejectment for a certain tract of land. The titles under which the plaintiffs and defendants respectively claimed sufficiently

appear from the opinion. The objections to the plaintiffs' title are also stated in the opinion. One objection was that the evidence by which the plaintiffs sought to prove the law under which the marriage of the parents of Mary Swazey, through whom the plaintiffs claimed, took place, was incompetent and insufficient. It appeared that the alleged marriage was celebrated in the Natchez country, in the Mississippi territory, prior to 1791. The evidence to prove the marriage is stated in the opinion; and it was proved by several witnesses, none of whom were learned in the law, that at that time it was customary in that territory for protestants to be married by a justice of the peace, and that a regulation to that effect had been made by the governor. The evidence was held competent in the court below. Another point relied on by the defendants, was that the plaintiffs' claim, if any, was barred by the statute of limitations. It appeared that Oliver Ormsby and his heirs, who were lessors of the defendants in this case, had been in possession of the premises for more than thirty years. The land, as appears from the opinion, was the property of Oliver Ormsby's father at his death, in 1806, and the said Oliver took out letters of administration on his estate, and took possession of the whole property, and received all the rents. The land was, however, assessed to the heirs of his father until 1820, when he had it assessed in his own name. There seems to have been no evidence of any demand of a share of the rents by any of the other heirs or of any refusal to pay over any part of the rents, or of any other indication of an exclusive claim to the property by Oliver Ormsby, except his having the property assessed to him after 1820. The court below instructed the jury that "the possession of one tenant in common is, *prima facie*, the possession of his companion also," and that therefore "the possession of the one can never be considered as adverse to the title of the other, unless it be attended with circumstances demonstrative of an adverse intent, such as demand by the co-tenant of his share of the rent, and refusing to pay, saying he claims the whole; or when one joint tenant bade the other go out of the house, and he went out accordingly," quoting *Lodge v. Patterson*, 27 Am. Dec. 335; and it was left to the jury to determine whether or not there had been any unequivocal act of Oliver Ormsby, showing that he had denied the title of Mary Swazey, and intended to hold adversely to her, before May, 1815. If so, the statute of limitations would be a bar; otherwise, not. The instructions, as a whole, favored the plaintiffs on all the points

insisted on by the defendants. Verdict and judgment for the plaintiffs, and the defendants brought error.

Dunlop and Shaler, for the plaintiffs in error.

Metcalf and Forward, for the defendants in error.

By Court, ROGERS, J. The plaintiffs claim title under Mary Swazey, the daughter of John Ormsby, jun., and Grace, daughter of John Ormsby, sen., and the defendants under the heirs of Oliver Ormsby, son of John Ormsby, sen., who died seised of the premises. In deducing title, it becomes material for the plaintiffs to prove that Mary Swazey was the legitimate daughter of John Ormsby, jun., and as such entitled to one third of her grandfather's estate. On this arises one of the principal questions in the cause. Mary Swazey was the daughter of John Ormsby, jun., by Lydia, who was the daughter of Nathan Swazey. It has been proved by testimony which leaves the matter clear of any doubt, that John Ormsby, jun., and Lydia Swazey, were married by a justice of the peace, and that Mary Swazey was the issue of the marriage. The marriage was celebrated in due form, within the limits of the present state of Mississippi, which at that time *de facto* was under the colonial government of Spain, although it has been since ascertained by commissioners appointed by this country and Spain, that the spot where the marriage took place was within the territory belonging to the United States.

These facts are proved by the father and mother of Mary Swazey, and by other ancient witnesses, who have been examined by the plaintiffs and defendant, and by the repeated acknowledgment of John Ormsby, jun., in his life-time. Notwithstanding this mass of testimony, the defendants contend there is no legal proof of the legitimacy of Mary Swazey, and that consequently the plaintiffs are not entitled to recover. The general principle is, that between persons *sui juris*, marriage is to be decided by the laws of the place where it is celebrated. If valid there, it is valid everywhere. If invalid there, it is equally invalid everywhere. To this rule, as to almost every general rule, there are well-recognized exceptions, and among others may be classed those marriages celebrated in foreign countries by citizens entitling themselves, under certain circumstances, to the benefit of the laws of their own country. That a foreign marriage, valid according to the laws of the place where celebrated, is good everywhere also, seems to be a rule of universal application, I mean as recognized in England and in this country. But our courts have not established, *e converso*, that marriages of citizens not good according to

the place where celebrated, are universally, and under all possible circumstances, to be disregarded. The best course unquestionably is, to be married according to the laws of the country where the marriage takes place, for then no question can arise. But if this can not be done on account of legal or religious difficulties, the law does not say, "that citizens shall not marry abroad according to the forms and ceremonies recognized as valid and binding in their own country."

The common law, under which we live, considers marriage in no other light than a civil contract; such a marriage as has been celebrated between these parties would be clearly good. Now supposing that the colonial laws of Spain viewed marriage as a sacrament to be celebrated only according to the forms prescribed by the catholic church (of which, by the by, we have not a shadow of evidence), still it may admit of a very serious doubt, whether, under the very peculiar circumstances of this case, the marriage would be held bad by the courts of this country, so as to bastardize the issue. The marriage took place between persons who were subjects of Spain *de facto* only, in a country the boundaries of which were unsettled, and in dispute between Spain and the United States, both parties claiming it, and which was subsequently found, on accurate survey, to be in truth within our limits. But this is a question which we are bound not to decide, as we are with the defendant in error on other grounds. The only point is, the manner the colonial laws of Spain, as to the mode of celebrating marriages, are required to be proved. It is an established principle that foreign laws can not be judicially taken notice of; the well-settled doctrine being, that no court takes judicial notice of the laws of a foreign country; but they must be proved as facts. In what manner, then, are they to be proved? and this, it is obvious, will vary according to circumstances. The general principle is, that the best testimony or proof shall be required that the nature of the thing admits of; or in other words, that no testimony shall be received which presupposes better testimony attainable by the party who offers it. And this rule applies as well to the proof of foreign laws as other facts. In this, as in all other cases, no testimony is required which can be shown to be unattainable: *Church v. Hulbert*,¹ 2 Cranch, 237.

Generally speaking, authenticated copies of written laws, or other public instruments of foreign governments, must be produced. They are required to be verified by the sanction of an

1. *Church v. Hulbert*.

oath, unless they are verified by some other high authority, which the law respects not less than the oath of an individual: 2 Cranch, 238. The usual modes of authenticating are by an exemplification of a copy under the great seal of the state, or by a copy proved to be a true copy, or by the certificate of an officer authorized by law, which certificate must itself be authenticated. Foreign unwritten laws, customs, and usages, may be proved, and must ordinarily be proved by parol evidence. And the usual course is to make such proof by the testimony of competent witnesses instructed in the law, under oath. But although these are the usual modes of authentication, yet they may be relaxed or changed as necessity, either physical or moral, may require, where there is reason to believe they are unattainable, and where a rigid adherence to them may probably produce extreme inconvenience or manifest injustice. In short, the peculiar circumstances of the case must enter largely into the consideration of the question of the competency of the evidence. In the first place it is a matter of no inconsiderable weight, that the adoption of the strict rule, in its application to the early settlers on the Mississippi, may jeopard the rights, and bastardize the issue, of many of our citizens. It must be recollected that this marriage took place fifty years ago, at a period when the boundary line between the United States and Spain was in dispute and unsettled; and that the place where it was celebrated has been since ascertained to have been within our limits. It must not be forgotten, that the territory was in a state of transition from France to Spain, from Spain to France, and from France to the United States, for most of the time under a colonial or territorial government, nor is it certainly known whether or where the edicts of the governor or superintendents of those provinces are preserved, whether they are in the archives of France or of Spain, or whether they remain among the local records of the present state of Louisiana or of the state of Mississippi. It may be, and most probably is, impossible to procure an authenticated copy of the edict or law by which marriage may have been regulated at that time within the colonial government of the Spanish monarchy. Nor will such proof be required; but it is contended that it might have been proved by the oath of witnesses instructed in the law; but whether the testimony of counsel at the present day, as to the temporary edicts or fleeting customs of a colonial government which was ever in a state of fluctuation, and which has long since passed away, could be obtained; or if obtained, would be

more satisfactory than the testimony which has been procured, is not very clear. At this distance of time, better testimony of the facts of the marriage of obscure individuals can not be expected. It is sufficient to satisfy the scruples of the most fastidious.

Before the defendants can be permitted to allege that such proof should not be laid before the jury, it was incumbent on them, under the peculiar circumstances of the case, to show that there was better in existence attainable by the plaintiff: that a justice of the peace was not authorized to celebrate marriages between persons who professed the protestant faith. It is very probable that a regulation, similar to one of which the witness speaks, was made by the local authorities. For in the documents collected by order of congress, we are informed, that the superintendent of the province of Louisiana was authorized to permit intermarriages between new settlers, and Spaniards of both sexes, with a view to the more easy incorporation with the natives. In that instance the laws of marriage were relaxed, and it is very likely that the conscientious scruples of protestant settlers were respected by the colonial government. The witnesses distinctly prove that it was customary for protestants to be married by a justice of the peace, that such a regulation had been made by the governor or superintendent, to whom the power was intrusted at the request of protestant immigrants, and that such marriages so celebrated were held valid by the political power of the state. Although it might be possible to give higher evidence than this of the marriage, yet it would be unreasonable to require it, as to a marriage celebrated between citizens of the country fifty years ago, in the settlements on the Mississippi. The only plausible exception which has been taken to the evidence is, that the testimony does not proceed from witnesses learned in law. But this objection is entitled to less weight as it respects the ceremony or validity of marriages, in which every citizen is so much interested, and with which in general they are so well acquainted. In Roman Catholic countries, and in some protestant countries, marriage is treated as a sacrament, but in this as a civil contract. It is very likely it is held to be a sacrament in the colonial governments of Spain, although it is by no means improbable, that as the witnesses state, in the then Spanish province of Louisiana there was a relaxation in the laws favorable to the conscientious scruples of persons of different religious creeds.

The plaintiff in error also alleges, that John Ormsby, jun. was

advanced by his father in his life-time to the full amount of his share of his father's estate.

The first of April, 1769, John Ormsby, sen., entered three applications for adjoining tracts of land; one in his own name, one in the name of his son John, and one in the name of his son Oliver, as whose heirs the defendants claim title. It is a general rule in equity, that when a man buys land in the name of another, and pays the consideration money, the land will generally be held by the grantee in trust for the person who so paid the purchase money. But this doctrine must be taken with some exceptions, which are not inconsistent with the general principle. For when a parent purchases in the name of the son, the purchase will be deemed *prima facie* an advancement, so as to rebut the presumption of a resulting trust for the parents. The moral obligation of a parent to provide for his children, is the foundation of the exception; or rather, of the rebutter of the presumption; since it is not only natural, but reasonable to presume, that a parent, by purchasing in the name of a child, means a benefit to the latter, in discharge of the moral obligation, and also as a token of parental affection. In addition to the legal intendment, that the application was designed as gifts to his two sons, it may also be inferred, that such was his intention, from his subsequent conduct. He suffered his sons to treat the land as their own, took out no patents himself, but left them to complete their titles for their respective tenants, by procuring patents when they arrived at age. Oliver, when he came of age, paid the purchase money for his tract, and obtained a patent in his own name, and for his own use. And John, when he came of age, being indebted to his father, and to others, conveyed his tract to his mother (by whom it was afterwards sold), and the purchase money applied to the payment of his debts. This was after John had left the country. We are therefore fully warranted in saying, that this was a gift by the father to the son, of a tract of land, at the time of the application.

Every fact in the cause leads us to the same conclusions. The conveyance from John to his mother was for a nominal consideration, and that it was with the assent and approbation of the father, is an inference which fairly results from all the circumstances attending the transaction, and with a full understanding that it should be sold, and the proceeds applied to the payment of the debts of John. For it appears, that the property conveyed to the mother was sold, and the proceeds passed to the credit of John, viz., the sum of six hundred pounds, received from

Culbertson, the purchaser. It can not be viewed in any other light than the payment of a debt, out of the proceeds of property, understood and acknowledged to be the property of John. The father explains the transaction by an "N. B.," to be a memorandum of the different payments on his son John's account. There is nothing which indicates that he had made or intended a gift to his son of the sum of six hundred pounds. It is an account stated, as debtor and creditor, between himself and son, in which he charges him with payments on his account, and credits him with money received in his character of trustee, or as the recipient of the money of the wife, who was the trustee. When we recollect the habits of John, his indebtedness to his father and others, connected with the subsequent conduct of the father in crediting the amount received, we can not bring ourselves to believe that the conveyance was intended as a gift, to the mother, of the premises. We are constrained to think it was designed for the honest purpose to which it was afterwards applied. It may have been that, at the time of the conveyance, John was not indebted to his father in the whole amount of the account, but there were debts then owing, and for which the father became responsible, and afterwards paid. If, then, this was intended as a gift by the father to his sons, it was an advancement to them, at the time of the application, to an amount equal to the sum, viz., seven shillings and sixpence, actually paid by the father. The subsequent rise in the value of the property, caused by the improved condition of the country, can not be taken into the account. The rule is to charge the child with the value of the thing at the time of the gift, and no better rule can be established to ascertain that value, than the amount which the parent has actually paid on account of the purchase. If a parent purchase land in the name of the son, and pay only part of the purchase money, it will not be pretended that the son is bound to bring into hotch-pot more than the amount paid, whatever artificial or real value the land may have obtained at the time of the death of the parent.

As to the statute of limitations. In the charge of the court to the jury there is no error, nor in truth is there any error assigned; although the counsel, in the argument, took exception to part of the charge. In those exceptions he has totally failed. The law on this point is so well settled, that it would be a waste of time to examine particularly all the positions laid down by the court.

Judgment affirmed.

MARRIAGE, VALIDITY OF, BY WHAT LAW DETERMINED: See *Decouche v. Savetier*, 8 Am. Dec. 478, and note; *Medway v. Needham*, Id. 131, and note; *West Cambridge v. Lexington*, 11 Id. 231; *Fornushill v. Murray*, 18 Id. 344; *Sneed v. Ewing*, 22 Id. 41; *Taylor v. Swett*, 22 Id. 156; *Harding v. Alden*, 23 Id. 549. That the validity of a marriage is determined by the *lex loci contractus*, is a point to which *Phillips v. Gregg* is cited in *Patterson v. Gaines*, 6 How. (U. S.) 587.

FOREIGN MARRIAGE, PROOF AND VALIDITY OF: See *Taylor v. Swett*, 22 Am. Dec. 156; *State v. Kean*, 34 Id. 162, and cases cited in the note thereto. As to the admissibility of parol evidence of the laws and customs respecting marriage, of the state in which a particular marriage was celebrated, see *Taylor v. Swett*, 22 Id. 156. As to the validity of a marriage celebrated before a magistrate in the Spanish colonies since ceded to the United States, the principal case is approved in *Hallett v. Collins*, 10 How. (U. S.) 181.

PROOF OF LAWS OF ANOTHER STATE OR COUNTRY: See *Lapice v. Smith*, 33 Am. Dec. 555, and other cases and notes in this series referred to in the note to that decision. See, also, particularly as to proof of laws relating to marriage, *Taylor v. Swett*, 22 Id. 156.

PURCHASE OF LAND BY FATHER IN SON'S NAME NOT AN ADVANCEMENT, WHEN: See *Jackson v. Matsdorf*, 6 Am. Dec. 355.

TRUST RESULTS FROM PURCHASE OF LAND IN ANOTHER'S NAME in favor of the party paying the consideration, when: See *Foots v. Colvin*, 3 Am. Dec. 478; *Denton v. McKenzie*, 1 Id. 664; *Jackson v. Morse*, 8 Id. 306; *Hall v. Sprigg*, 12 Id. 506; *Guphill v. Isbell*, 19 Id. 675; *Jackson v. Miller*, 21 Id. 316; *Kisler v. Kisler*, 27 Id. 308; *Depeyster v. Gould*, 29 Id. 723; *Smitheal v. Gray*, 34 Id. 664.

ENTRY AND POSSESSION BY ONE CO-TENANT INURE GENERALLY to the benefit of all the co-tenants: See *Coleman v. Hutchenon*, 6 Am. Dec. 649; *Shamway v. Holbrook*, 11 Id. 153; *Lodge v. Patterson*, 27 Id. 335, and note; *Vaughan v. Bacon*, 33 Id. 628.

OUSTER AND ADVERSE POSSESSION BY CO-TENANT: See *Coleman v. Hutchenon*, 6 Am. Dec. 649; *Barnard v. Pope*, 7 Id. 225, and note; *Gillaspie v. Osburn*, 13 Id. 136, and note; *Jackson v. Whitbeck*, 16 Id. 454; *Town v. Needham*, 24 Id. 246; *Thomas v. Garvan*, 25 Id. 708; *Lodge v. Patterson*, 27 Id. 335, and note; *Baird v. Baird's Heirs*, 31 Id. 399, and note. The doctrine of the principal case on this point is referred to with approval in *Blackmore v. Gregg*, 2 Watts & S. 189; *Bolton v. Hamilton*, Id. 299; *Hall v. Mathias*, 4 Id. 336. It is cited generally as an authority on the subject of what constitutes such a possession as will be ripened into a title by the statute of limitations, in *Hockenbury v. Snyder*, 2 Id. 250.

HART v. GREGG.

[10 WATTS, 185.]

ENTRY BY ONE CO-TENANT OR COPARCENER inures to the benefit of all, and can not become adverse without some unequivocal act amounting to an actual disseisin or ouster of the other co-tenants.

PERCEPTION OF RENTS AND PROFITS BY ONE CO-TENANT, and erecting fences and buildings adapted for the cultivation of the common land, do not

amount to a disseisin of the other co-tenants: so, it seems, even though the receipt of the rents and profits is accompanied by a claim of title to the whole land.

TAKING OUT PATENT TO LAND BY ONE CO-HEIR expressly in trust for himself and the others is evidence of an intention to hold for all.

IMPROPER ADMISSION OF RECORD COPY OF INSTRUMENT, the original of which is in the possession of the party offering it, is cured by the subsequent production of the original.

ERROR to Allegheny county district court in an action of ejectment to recover the undivided third part of a certain tract of land. The plaintiffs and defendants claimed respectively under the same title as in the preceding case of *Phillips v. Gregg*. The points relied on were also, in the main, the same. The principal reliance of the defendants, however, was on the statute of limitations. The facts upon which that defense was based, in addition to those given in the statement to *Phillips v. Gregg*, are sufficiently stated in the opinion. Among other evidence, the plaintiffs, to prove the derivation of their title from Mary Swazey, introduced a copy of a deed to themselves from the said Mary Swazey and her husband, from the records of the recorder of deeds. The defendants objected to the copy because the plaintiffs were in possession of the original, but the copy was admitted, and the defendants excepted. Afterwards the original was produced, and handed to the defendants. The court below gave the same instructions as in *Phillips v. Gregg*, *ante*, 158.

Dunlop and Shaler, for the plaintiff in error.

McCandless and Metcalf, for the defendant in error.

By Court, **SERGEANT, J.** The only point in this case which distinguishes it from those already decided in the other cases, arises upon the statute of limitations. The defendant insisted, that the circumstances proved in the cause were of such a nature, as that in point of law, the jury were bound to presume an actual ouster of the plaintiff by Oliver Ormsby. The court below refused to give this binding instruction to the jury, but left it to them to decide, as a matter of fact upon the evidence; and this leads to an investigation of the origin and grounds of the law on this subject, and of the principles settled in respect to it.

Littleton in his *Tenures*, and Lord Coke in his *Commentaries* on Littleton, are perhaps sufficient to show us how the law existed in their days, and has been handed down to us. Littleton, in section 396, says, if a man seised of land in fee, have

issue two sons, and die seised, and the youngest son enter by abatement into the land, and hath issue, and dieth seised, and the land descend to his heir, and the issue enters, in this case, the eldest son and heir may enter by the law upon the issue of the younger son, notwithstanding the descent; because that when the youngest son abated before any entry by the youngest son, the law intends, that he entered claiming as heir to his father; and for that the eldest son claims by the same title, that is to say, is heir to his father, he and his heirs may enter. But (he says in section 397), the case is different if the eldest son enter and is seised, and after the youngest son disseiseth him, because the youngest son cometh to the lands by wrongful disseisin done to his eldest brother, and is like a stranger. In section 398, he puts the case of coparceners. In the same manner, if a man seised of land has issue, two daughters, and dieth, the eldest daughter enters into the lands claiming all to her, and thereof solely taketh the profits, and has issue and dies seised, by which her issue enter, etc., yet the younger daughter or her issue, as to the moiety, may enter upon any issue of her elder daughter, for that they claim by one same title. So in note 175, by Lord Nottingham, to Co. Lit., one coparcener can not be disseised without actual ouster, and claim shall not alter the possession.

According then to these, the highest authorities in the land, the entry by one coparcener into the whole, claiming it all and taking the rents and profits of the whole to herself, is no disseisin, or at any rate, if it is so at all, can only be at the election of the disseisee. There must be something more—there must be some plain, decisive, and unequivocal act or conduct on the part of the coparcener who enters, amounting to an adverse and wrongful possession in herself, and disseisin of her companion. Several cases of this kind are put by Lord Coke, and may be infinitely varied in each particular case. "Thus," he says, "if both sisters had entered after the death of their father, and were seised, and then the eldest disseised the younger of her part, and was thereof seised in fee, and hath issue, the younger nor her heir can not enter: Co. Lit. 242. So if one coparcener enter claiming the whole, make a feoffment in fee, and taketh back an estate to her and her heirs, and has issue and dies seised, this descent takes away the entry, because by the feoffment the privity of the coparcenary is destroyed." That the same rule applies with equal force to joint tenant and tenants in common; viz., that the entry of one shall

generally be taken as an entry for his companion as well as himself, is everywhere admitted. Children taking by descent under our laws as statutory heirs, though they hold as tenants in common, yet are in many respects in the nature of coparceners, and they take, like coparceners, by one and the same title; and there is a similar privity of estate between them, to destroy which a disseisin must be made by any one entering as heirs.

The modern cases, generally speaking, have conformed to the principles laid down by Littleton and Coke. In *Reading's case*, 1 Salk. 392, it is said that between tenants in common there must be an actual disseisin, as turning him out, hindering him to enter, etc., and a bare perception of profits is not enough. In *Fairclaim v. Schochleton*,¹ 5 Burr. 2604, it was decided, that a perception of profits by one tenant in common alone without account is no actual ouster—there must be an actual disseisin proved. It is true, that in *Doe v. Prosser*, Cowp. 217, it is commonly stated to have been held, that uninterrupted possession by one tenant in common without account, and without adverse claim for thirty-six years, was a bar to his companion; but there the tenant in common held over in her own right, after a partition for the life of her husband, and Lord Mansfield puts the case on the ground of a holding over after the particular estate was ended. Besides which, the jury found an actual ouster by presumption from the facts proved. *Peaceable v. Read*, 1 East, 568, was a strong case; there a female tenant in common died, after having made an appointment of her share. The other, claiming under a later instrument, made when she was insane, levied a fine soon after her death, of the whole, and received all the rents and profits for nearly five years without account. Yet this was held no ouster, and that some act to that effect must be shown. Such an act appeared in the case of *Doe v. Bird*, 11 East, 219,² where it was decided that one tenant in common in possession claiming the whole, and denying possession to the other, is something beyond the mere receiving of rents, which is equivocal, and was evidence of an ouster. So in *Lodge v. Patterson*, 3 Watts, 74 [27 Am. Dec. 335], the one brother put up the other's share at public vendue, and became the purchaser himself, and held and occupied for twenty-one years and more under it.

It thus appears that if Oliver Ormsby had desired to dispossess his brother and sister, or either of them, and gain the exclusive and adverse possession for himself, it was easy for him to do so

1. *Fairclaim v. Shackleton*.

2. 11 East, 49.

by various acts, of the design and effect of which, in point of law, there could have been no mistake. If he has not chosen to do so, we would not be obliged to impute to him, either while living or now, since his decease, a tortious and unjust proceeding, which he himself declined to adopt. The law rather considers him as faithful to the interests of those so nearly related to him by blood, and as not willing to destroy the privity of estate existing among brothers and sisters, holding under a common parent, by inheritance. In the inequalities of age, and separations of residence, which continually occur among us, on the descent of lands of inheritance to all the children equally, it must often happen that one is placed in a position in which the care and preservation of the common property is thrown upon him, and a duty imposed, as well by regard for deceased parents, as by those intimate ties and feelings that connect together one family, and this duty is often cheerfully encountered. To throw it off, to attempt to deprive those so near of their equal share of the inheritance of their parent, is not a design which every man would deem just and honorable, or desire to have imputed to him; for however it may have been in the earlier ages of the English law, for reasons not now, perhaps, well understood, yet nowadays, titles gained from co-heirs by disseisin, are not much in accordance with our notions of justice and morals; especially among children of the same family as against each other. The law, therefore, recognizes one entering as co-heir or co-tenant, as bailiff, trustee, or receiver for the others: equity allows him all charges incurred in the care and reasonable improvement of the property for the common benefit, and the statute of Anne gives the others an action of account render against him, for the share of the rents and profits which he ought to pay over.

In looking at the case before us, we are at a loss to discover any act or course of conduct on the part of O. Ormsby, amounting in law to a disseisin of his brother and sister. He never turned them out, nor denied them possession. He never created a new title in himself or any other person under which possession was held. He never, in point of law, threw off the relation of brother and co-heir to assume the position of a stranger. All he did was to enter and keep the possession, lease the property, and receive the rents, erecting fences and buildings, adapted to its cultivation and profit. He does not seem even to have claimed it as his own, though even that alone, though accompanied with the receipt of the rents and profits, would not, according to many authorities, be an ouster. On the contrary, he

took out a patent in 1813, expressly in trust for himself and the other heirs of his father—and the lands were taxed in the name of the heirs until 1820. So far as we can judge of his intentions by the evidence, there is nothing to justify the belief that he intended to claim or hold against his brother and sister: and even if there were, there is no evidence of any act or proceeding amounting to a disseisin of his brother John Ormsby, or his heir, under whom the plaintiffs claim.

As to the other points raised in this case of the advancement and marriage, I refer to the opinion of the court delivered at this term, by Mr. Justice Rogers, in the other Ormsby cases. There is nothing in the bill of exceptions. The defect in the evidence (if any existed) was cured by the production of the deed itself immediately afterwards.

Judgment affirmed.

ENTRY AND POSSESSION OF CO-TENANT DEEMED ADVERSE, WHEN, AND WHEN NOT.—The cases on that subject in this series are collected in the note to *Phillips v. Gregg*, ante, 158. As to what constitutes adverse possession by one tenant in common against his co-tenants, the principal case is recognized as authority in *Hall v. Mathias*, 4 Watts & S. 336; *Blackmore v. Gregg*, 2 Id. 189; and *Dubois v. Campan*, 28 Mich. 324. In *Bolton v. Hamilton*, 2 Watts & S. 299, and *Calhoun v. Cook*, 9 Pa. St. 227, the dictum in *Hart v. Gregg*, that perception of the profits by one tenant in common, accompanied by an exclusive claim of right, is not sufficient to make his possession adverse to co-tenants, is referred to as being contrary to previously adjudged cases, and unsound.

BLACKMORE v. GREGG.

[10 WATTS, 222.]

BAR OF TWO VERDICTS IN EJECTMENT IS STATUTORY ESTOPPEL which affects only parties and privies.

GRANTOR AND GRANTEE ARE PRIVIES IN ESTATE only as to acts done or suffered by the former before conveyance.

VERDICT AND JUDGMENT ARE NOT CONCLUSIVE as to matters incidentally brought in question.

VERDICT AND JUDGMENT IN EJECTMENT FOR PLAINTIFF WHO HAS CONVEYED the land to another after action brought, and who, upon that fact being shown, recovers only his damages and costs, will not affect the title, and will not, in conjunction with a prior recovery in ejectment by the same plaintiff against the same defendant, conclude the latter in a subsequent ejectment brought against him by the plaintiff's grantee.

ERROR to Allegheny county district court, in an action of ejectment. The plaintiffs, in addition to other proofs of title, gave in evidence the records of two recoveries in actions of eject-

ment heretofore brought by the plaintiffs' grantors against those under whom the defendants were tenants, for the same land. In the first action, brought in the United States district court, the plaintiffs' grantors had verdict and judgment, and the defendants sued out a writ of error to the United States supreme court, but afterwards abandoned it. The plaintiffs' grantors afterwards brought another ejectment against the defendants for the same land, in the Allegheny county district court. The defendants, however, after the plaintiffs had produced their evidence of title, proved that after the action was brought they, the plaintiffs in that action, had conveyed the land to the present plaintiffs. The jury, therefore, under the direction of the court, found a verdict in favor of the plaintiffs in that action for nominal damages and costs only, and judgment was entered on that verdict. In the present action, the court below, on the production of the records of the two prior recoveries, instructed the jury that the two verdicts and judgments so recovered were conclusive as to the title in favor of the plaintiffs. Verdict and judgment for the plaintiffs accordingly, and the defendants brought this writ of error, assigning error in the instructions.

Dunlop, for the plaintiffs in error.

McCandless and Forward, for the defendants in error.

By Court, GIBSON, C. J. The bar of two verdicts in ejectment is a statutory estoppel; and estoppels have effect only between parties and privies. The statute does not, indeed, expressly require the two verdicts to have been betwixt those who stood in that relation to the parties to be affected; but it would be monstrous to doubt that such was the intent. Statutes are to be interpreted as near as may be to the principles of the common law, especially in respect to matters which it may have been thought unnecessary to specify in detail; and it would have evinced a ridiculous attention to *minutiae*, had it been specially provided that a title should be impaired or affected by a verdict between one of the parties and a stranger. Now, though grantors and grantees are privies in estate so far as regards acts suffered or done at the time of the conveyance, it is fallacious to pretend they are such as to acts suffered or done afterwards. Every vendee takes the title subject to the consequences of his predecessor's acts during his seisin; but that it is not to be affected by a verdict against him, or by any act done by him afterwards, seems almost too clear for argument. On the principle of privity as to future acts, a vendor might charge the land in the hands

of the vendee by suffering a judgment in debt; and if it be conceded, as it must, that he may not, I am unable to understand how he may burden it with the consequences of an unsuccessful verdict, in an ejectment prosecuted at will for damages and costs. Ought not the remote, as well as the proximate, consequences of such an action to be exclusively at his risk? What seems conclusive of the affirmative is, that if the vendor's action on the title were treated as the action also of the vendee, it would preclude the vendee from suing for the possession till it were determined; for its pendency would be a sure ground to stay proceedings in an action brought by him; or, now that the parties are the same, the vendor's action might, perhaps, be pleaded in abatement of it. But as the vendee could derive no advantage from a verdict which would not serve to put him in possession, it would be unjust to make him wait the vendor's turn, and perhaps till the statute of limitations had closed upon the title—a consequence which no recovery of damages by the vendor could postpone or avoid. Yet the court would be bound to stay proceedings or entertain a plea in abatement if the vendor and vendee were deemed to be embarked in the same bottom; otherwise, as a verdict against the one might bar the other, there would be a scuffle betwixt them for priority of trial. But if the court, in the exercise of its judicial discretion, should refuse to stay proceedings, it could be justified only on the principle, that the vendor's action is not the action of the vendee: a principle that would make short work with the argument; for it would bring death to it to admit that they do not constitute one party. I take it then to be clear, that the present defendants would not have been entitled to count the verdict as a point, in the game with the plaintiffs, had it been in their favor.

Again. What is an ejectment pending after the plaintiff has parted with his title? It is a proceeding which has shrunk, in substance, into what the primitive ejectment was in form—an action of trespass to recover damages and costs for an ouster, in which the title is tried, in subservience of the end, only incidentally. Now it was ruled in the *Duchess of Kingston's case*, 11 St. Tr. 261, and has been held for an elementary principle ever since, that the judgment of a court, even of exclusive jurisdiction, is inconclusive of a matter thus brought into question; and it surely was not the purpose of the legislature to give conclusive effect to two verdicts where a single one would not have had it in an ejectment, stripped of the fiction which afterwards deprived it of the conclusive qualities of a recovery.

in a writ of entry or a writ of right. In its origin, ejectment was a simple action of trespass, by which neither possession nor compensation for mesne profits was demanded; and it consequently might have been brought when the title had been conveyed. Indeed, as damages for the supposed ouster are held to be a substantive and distinct cause of action at this day, I see not why an ejectment might not be brought for it still; nor, if it were to have the incidental consequences of an action to recover the possession, do I see why it might not be repeated, *toties quoties*, till it had undone the title in the vendee's hands, though it were free from defect when he purchased it. If a single verdict would not be conclusive against the vendee, it would not be conclusive against the vendor.

It is idle to say the vendor is allowed to prosecute his pending ejectment, only for the costs already incurred in it. There is no recovery of costs in any case independent of a substantively and distinctly existing cause of action; for it is the recovery of damages which, under the statute of Gloucester, entitles a plaintiff to costs. A vendor who has conveyed after action brought, could claim to go for costs, *per se*, with no better grace than could a plaintiff who had indorsed his negotiable note after action brought on it, and thus attempted to subject the maker to the costs of repeated actions. It is for necessary damages suffered from the ouster, that such a vendor goes. On the hypothesis of the argument, then, he might repeat his action till he had drawn down upon the title two adverse verdicts and judgments in the hands of the vendee. If it be said that the vendee takes the land voluntarily, and therefore subject to the risk of that, what would be said of a purchaser under his own judgment who takes it to protect his lien? Under the primitive form of the action, it would have shocked the general sense to pretend, that his debtor still retained a power to affect the title by an action on it. And in what respect has the vendee's ownership been jeopardized by the form devised to let in a recovery of the land?

Take it that a defendant in ejectment had set up, in bar of all but damages, the plaintiff's conveyance to a third person, which, however, was determined to be a forgery—it would not be pretended, that the verdict in such an action might be admitted as evidence in an action by the vendee against the vendor. It would be decisive of its incompetency, that the vendee's title had been repudiated in an action to which he was neither party nor privy, and in which he could not have been received to pro-

duce proofs or cross-examine. Thus it stood at the enactment of the statute in 1807; and is it to be supposed, that the common law principle of privity was intended to be changed by it, or that two verdicts should be conclusive of matters adjudicated incidentally, as the title is where the land itself is not demanded, but damages for a trespass done to it? In abolishing the fiction which alone had prevented the verdict from being conclusive, the legislature did not choose entirely to restore the conclusiveness of the judgment under the original form of the action; and it certainly was not intended to give a wider sweep to two verdicts, than had been allowed to one: for the power to bar the title by two, was not in furtherance of the common law principle of conclusiveness, but in restraint of it. By the interpretation pressed upon us, the vendee's title might be destroyed without his participation, by a single verdict in an action for damages, prosecuted after failure in an action for the possession. That injustice might doubtless be done, did not the common law principles already invoked, come in to mitigate the rigor of a literal construction, by declaring that a vendee stands in privity to his vendor only in respect to acts suffered or done before the title was conveyed; and by declaring also that between even parties and privies, a judgment is conclusive only of those things which were directly adjudicated. If the vendee's land were affected by an unsuccessful verdict in the vendor's ejectment, I know not why it might not as well be bound by a judgment in debt against him, pending also at the time of the conveyance. Such a judgment ought to go as far to bind the land, as an adverse verdict in ejectment ought to go to affect the cause of action. Here, the attempt is to make it affect more than the cause of action, by extending its effect from the damages which were sought to be recovered, to the land which was not. Surely the vendee is not to be prejudiced by the result of an enterprise attempted by the vendor for his peculiar benefit; for what matters it that his title to damages was identical with the vendee's title to the land? Though springing from a common root, the causes of action afforded by it are different and distinct.

The rule perhaps is universal, that he who stands not in privity, and has neither day in court nor right to be made a party, is not to be prejudiced by the judgment; and it will not be disputed that he who could not have been prejudiced by it shall not have advantage from it. The principle is text law. And there was no design to change it; for though a verdict in an ejectment prosecuted only for damages, may be within the letter of the

enactment, it surely never was intended to affect the title of one who had no agency in producing it. The case in view was the ordinary one—that of a title tried in a contest for the possession and made a subject of direct adjudication; for had the occurrence of a case like the present been foreseen, it would doubtless have been excepted; and we but carry out the spirit of the statute in making it an exception by implication.

Judgment reversed and a *venire de novo* awarded.

JUDGMENTS, CONCLUSIVENESS OF: See *Skinner v. Moore*, 30 Am. Dec. 155, and cases cited in the note thereto.

PLAINTIFF IN EJECTMENT MUST RECOVER ON TITLE held at the commencement of the action as it stands at the time of trial: *Alden v. Gross*, 18 Pa. St. 385, citing *Blackmore v. Gregg*.

WATSON v. GREGG.

[10 WATER, 289.]

GRANTOR'S ENTRY AFTER CONVEYANCE MUST BE DEEMED ADVERSE TO THE GRANTEE where there is no evidence that he entered for or under him, but where he acted in all respects as the sole owner and claimant, making leases, receiving rents, paying taxes, improving the property, etc., and uninterrupted enjoyment for twenty-one years will give him a complete title.

TITLE OR COLOR OF TITLE IS UNNECESSARY to constitute an adverse possession under the statute of limitations.

ENTRY AND POSSESSION BY ONE OF SEVERAL HEIRS of a person dying in adverse possession of land inure to the benefit of himself and all the co-heirs, and the adverse possession is thereby continued for the purpose of gaining title.

HEIR CAN NOT OUST HIS CO-HEIRS, so as to gain title to himself, in land descending to them, upon which he has entered, without some clear, positive, and unequivocal act amounting to an open denial of their right.

PERCEPTION OF RENTS AND PROFITS BY ONE CO-HEIR in possession of land of the ancestor is not sufficient to raise a presumption of an ouster of the other heirs.

ADMISSIONS AS TO OUTSTANDING TITLE BY ONE CO-HEIR in possession of land held adversely by the ancestor at his death do not affect the rights of the other heirs, where there is no yielding of possession, or attornment to, or communication with, the holder of such outstanding title.

DEED FROM PERSONS CLAIMING TO BE HEIRS of a former owner of land is not admissible in evidence without proof that they are heirs.

ERROR to Allegheny county district court in an action of ejectment brought by Sidney Gregg for an undivided one third part of certain land claimed by her as one of the children and heirs

of John Ormsby, deceased. One of the defendants claimed as tenant under the heirs of Oliver Ormsby, deceased, the said Oliver being also one of the children and heirs of John Ormsby. The other defendant claimed under conveyances from the alleged heirs of one Lamb and one Checkly. It appeared that in 1788 John Ormsby conveyed the land to Lamb and Checkly by a deed which was duly recorded. But neither the grantees nor their heirs, as it appeared, had ever exercised any acts of ownership over the land or laid any claim to it after recording their deed, for upwards of fifty years, the said grantees having left that part of the country shortly after 1788. It appeared that in 1790 John Ormsby entered on the land, claiming it as his own, and continued in possession personally or by his tenants until his death in 1805; that he acted in all respects as owner, making leases, collecting rents, paying taxes, etc.; that after his death his son and administrator continued his possession, exercising like acts of ownership on behalf of the estate; that prior to 1820 the said Oliver had the property assessed to his father's estate, and charged the heirs with the taxes paid and the farming expenses, etc., but that after 1820 he had it assessed to himself. A number of admissions on the part of the said Oliver were proven, to the effect that the property did not belong to his father's estate and it was not worth while to improve it; that his father had sold it long before his death, and that he did not know what moment the owners might come for it, but whenever they did come they could have it. On the part of one of the defendants, deeds were produced from certain persons stated to be the heirs of Lamb, but on objection by the plaintiff they were rejected for want of evidence that the persons named were the heirs of Lamb. The defendants excepted. The court left it to the jury to determine whether or not the entry and possession of John Ormsby as continued by his son were adverse to Lamb and Checkly, his grantees, instructing them, among other things, that such entry and possession were adverse if he intended to oust his grantees; that a disseisor must be presumed to have entered for himself until the contrary appeared, and that the jury had no right to conjecture an intent contrary to the notorious acts of the party; that a claim of right or color of title was unnecessary to found an adverse possession; that the admissions of Oliver Ormsby could have no retrospective effect, so as to change the nature of his father's entry, if originally adverse; that the entry and possession of the said Oliver inured to the benefit of his co-heirs as well as of himself; and finally that,

in the opinion of the court, there was nothing in the evidence to prevent a verdict for the plaintiff. These and other points in the charge, not necessary to be noticed, were, after verdict and judgment for the plaintiff, assigned by the defendants as errors.

Dunlop, for the plaintiffs in error.

McCandless, for the defendant in error.

By Court, SERGEANT, J. The principal error relied on in this case is in the charge of the court, but we think the complaint of the defendant is without foundation. The entry of John Ormsby must be taken to have been adverse to the title of Lamb and Checkly, in the absence of any sort of evidence that he entered for them, or held under them. He acted, in all respects, as the sole owner and claimant of the inheritance, making leases, receiving rents, paying taxes, and preserving and improving the property. He had no title, or color of title, that we know of. He was merely a trespasser, but such an occupant as by our law gains a complete title by disseisin, after an uninterrupted enjoyment for twenty-one years: *Pipher v. Lodge*, 4 Serg. & R. 310, and 16 Id. 214. On his death, his son, Oliver Ormsby, entered and held, not in his own right, but *jure representationis*, as one of the sons and heirs of his father, and as tenant in common with the other heirs. By so doing he preserved the claim or initial title, such as it was, of the whole of the heirs, and as much for their benefit as for his own. For it has long been a settled principle, that the entry and possession of one coparcener, joint tenant, or tenant in common, into lands, is the entry and possession of the others, whether it be, on the one hand, to prevent the statute of limitations running against them in his favor, or, on the other, to preserve and perpetuate their rights as possessors, and to gain a title thereby. The heir who enters is considered as doing so for himself, as regards his own right, and as trustee for the others, and accountable to them for their portion of the rents and profits received by him, during the time he so holds the lands. It is in consequence of this sort of fiduciary relation in which he is placed, as to the others, that he is not ordinarily allowed to claim for himself an interest opposite to that of the others, but his acts are treated as theirs, and for their common benefit. He may, it is true, oust the other heirs, and gain the title for himself; but this must be by some clear, positive, and unequivocal act, amounting to an open denial of their right, and putting them out of the seisin. Such ouster

will not be presumed merely from his taking the rents and profits (unless after a lapse of a very great length of time), but must be proved by decisive acts of a hostile character: *Lodge v. Paterson*, 3 Watts. 74 [27 Am. Dec. 335]; *Ford v. Grey*, 1 Salk. 285; *Smales v. Dale*, Hob. 120; *Fisher v. Prosser*, Cowp. 218; *Fairclain v. Shackleton*, 2 W. Bl. 2620;¹ *Burr*. 2604; Co. Lit. 242 a, b; 1 East, 568.²

It can not be pretended here, that Oliver Ormsby ever thus ousted the other heirs. On the contrary, he recognized his duty to them by holding the possession, taking care of it, receiving the rents, making leases, paying taxes and other expenses, and charging the estate in his accounts with their proportion of his disbursements. It would require much stronger facts than any here shown, to establish, that he at any time divested the rights of the other heirs, and to enable him to claim the whole for himself, or to admit an outstanding title in a third person as against them. There is nothing to warrant the idea that he ousted the other heirs; and as to the title of Lamb and Checkly, he never yielded up the possession to them, or attorned to them as their tenant, or had any intercourse or communication with them, nor had he, or any of the other heirs, any knowledge of them. All that is shown is, that at different times, he stated to these persons, that there was an outstanding title of some kind, which might, at a future day, be asserted for the land. This could not affect the possession taken and held by his father, John Ormsby, and cast upon his children by descent, which Oliver continued and carried on by his possession: and in fact, in legal operation, as against their rights, amounted to nothing. The court was, we think, right in saying, that the statute would run in favor of the heirs, if Oliver Ormsby continued the possession, received the rents, and paid the taxes, though he knew and admitted that there was a better title to the land, and expressed his belief of its appearing one day.

In regard to the bill of exceptions, we see no error in the rejection of the depositions by the court. The question was not of identity, that is, whether the persons now suing are the same as those who executed the powers of attorney: but whether certain persons claiming as heirs, and executing conveyances to the defendant, on which he sets up a title, must not be proved by evidence of some sort or other, to be such heirs, before the conveyances can be read: and it is clear they must.

Judgment affirmed.

1. 2 W. Bl. 690; S. C., 5 Burr. 2604.

2. *Peaseable v. Read*.

COLOR OF TITLE, WHAT IS, AND NECESSITY OF TO SUPPORT ADVERSE POSSESSION: See the notes to *Tate v. Southard*, 14 Am. Dec. 580, and *Ferguson v. Kennedy*, Id. 764. See also *La Frombois v. Jackson*, 18 Id. 463; *Riley v. Jameson*, 14 Id. 325; *Rung v. Shoneberger*, 26 Id. 95, and cases cited in the note thereto. The principal case is cited on this point in *Woodward v. Blanchard*, 16 Ill. 434.

ENTRY AND POSSESSION BY CO-TENANT WHEN DEEMED ADVERSE: See note to *Phillips v. Gregg*, *ante*, collecting the cases in this series on that subject. The doctrine of *Watson v. Gregg* on this point is approved in *Hall v. Mathias*, 4 Watts & S. 337.

HAINES v. O'CONNER.

[10 WATTS, 313.]

PURCHASER AT SHERIFF'S SALE WILL NOT BE DECLARED TRUSTEE for the debtor where he has paid the purchase money, and is guilty of no fraud, merely upon proof of a parol agreement on his part to purchase the land for the debtor, such an agreement being within the statute of frauds.

ERROR to Allegheny county district court, in an action of ejectment for a certain lot of ground. It was admitted that the plaintiff was the original owner. The defendant claimed under a devise from her father, and proved that her father, Dominick O'Conner, purchased the land in 1823, at an execution sale on a judgment recovered against the plaintiff. The plaintiff, however, contended that the purchase was made for his benefit, and that O'Conner was merely a trustee for him; and introduced evidence tending to show that, at the time of the sale, O'Conner stated to other bidders that he was bidding in the land for Haines, the execution debtor; that by his representations in that particular he induced other persons to refrain from bidding, and was thereby enabled to purchase the land at a price below its real value; and that he afterwards repeatedly stated that he had purchased the land for Haines, and that when the latter paid him what he paid for it he should have it, and that he had refused to sell it to others on that ground. There was evidence, on the other hand, offered by the defendant, tending to show that O'Conner made the purchase for himself, but that he afterwards stated that if Haines would pay him the amount of his bid and certain other money that he owed him, he might have the property. The defendant's witnesses also testified that the price paid by O'Conner was fully equal to that paid for similar property at forced sales about the same time. The court instructed the jury, among other things, that if O'Conner purchased the property with his own money, expressing an intention to let

Haines have it upon his repaying the amount paid for it, and if he bought it fairly as the highest and best bidder, and afterwards frequently expressed his willingness to let Haines have it on those terms, which offers were not accepted by Haines or his friends, the case was not one which would be treated as raising a trust *ex maleficio*, but was within the statute of frauds; and further, that O'Conner could not be declared a trustee except upon proof of fraud or artifice practiced by him at the sale, to the injury of Haines and his creditors. Verdict and judgment for the defendant, and the plaintiff sued out this writ, assigning error in the instructions.

Shaler, for the plaintiff in error.

Forward, for the defendant in error.

By Court, ROGERS, J. If the case of *Brown v. Dysinger*, 1st Rawle, 408, has been understood to have ruled, "that if I proclaim that I hold my house for B., on terms of conveying it to him when he shall reimburse me what I have paid, it is a trust which will be enforced;" it arises from a misapprehension of what was intended to be decided. A contrary doctrine is taught in *Kepler v. Kepler*,¹ 2 Watts, 327, and in the recent case of *Robertson v. Robertson*, 9 Id. 42. In the latter case it is ruled, that although in all cases of fraud, and where the transaction in relation to the purchase of land has been carried on *mala fide*, there is a resulting trust by operation of law, yet unless there is something in the transaction more than is implied from the mere violation of a parol agreement, equity will not decree the purchaser to be a trustee. A purchaser at a sheriff's sale, who has paid the money, can only be held a trustee *ex maleficio*, on the ground of fraud; and where he is guilty of fraud, he is a trustee for the creditors and for the debtor also, unless the debtor be *particeps criminis*. But without the ingredient of fraud, as in the case of private sales, he may avail himself of the protection of the statute of frauds. There is nothing in the charge which contravenes these principles. The law is well stated, and the case has been properly left to the jury, under all the facts, with a proper direction; there is nothing, therefore, of which the plaintiff in error can complain. We must be careful to avoid unsettling titles to real estate, upon parol proof of bargains made a long time since, particularly where the property has greatly increased in value, or where it has passed into other hands. If the court should yield to such claims, it is im-

1. *Kistler v. Kistler*; 8 C., 27 Am. Dec. 308.

possible to foresee where the mischief will end, from the ease with which such testimony can be procured, tempted as they will be by the chances of receiving large estates, on proof of such agreements. If a parol contract for the conveyance of land has been violated, the party has his remedy by action, when he will recover the damages he has actually sustained.

Judgment affirmed.

PERSON ACQUIRING TITLE BY FRAUD IS TRUSTEE FOR THE INJURED PARTY: *Coleman v. Cocks*, 18 Am. Dec. 757.

ESTABLISHING TRUST BY PAROL: See *Steers v. Steers*, 9 Am. Dec. 256; *German v. Gabbald*, 5 Id. 372; *Blake v. Jones*, 21 Id. 530; *Jackson v. Miller*, Id. 316; *Hills v. Elliot*, 7 Id. 26; *Snelling v. Utterback*, 4 Id. 661; *Wallace v. Duffield*, 7 Id. 660; *Pritchard v. Brown*, 17 Id. 431; *Towles v. Burton*, 24 Id. 409, and note; *Hoge v. Hoge*, 26 Id. 52, and note. A written acknowledgment, made without consideration, that another is entitled to property in one's possession is not sufficient to create a trust: *Thompson v. Branch*, 34 Id. 153. In *Lloyd v. Carter*, 17 Pa. St. 221, and *Freeman v. Freeman*, 2 Pa. Sel. Cas. 89, the case of *Haines v. O'Conner* is referred to as recognising the doctrine that a trust may be established by parol in Pennsylvania. But a mere declaration that one is about to purchase land for another without any previous arrangement or sufficient consideration is not enough: *Blyholder v. Gilson*, 18 Pa. St. 137. Nor will equity declare a purchaser of land a trustee for another, who has not paid the purchase money, where there is nothing more in the transaction than a simple violation of a parol agreement; but the party will be left to his remedy at law: *Fox v. Hefner*, 1 Watts & S. 376; *Jackman v. Ringland*, 4 Id. 150. In all these cases *Haines v. O'Conner* is cited as authority. *Fox v. Hefner* was almost identically the same kind of a case. In *McOulloch v. Couper*, 5 Watts & S. 431, Woodward, J., in the court below, quotes with approval the language of Mr. Justice Rogers in *Haines v. O'Conner* as to the danger of unsettling titles by admitting proof of parol bargains.

KIRKPATRICK v. BLACK.

[10 WATTS, 329.]

SHERIFF LEVYING EXECUTION IS REGARDED AS PLAINTIFF'S AGENT, in some degree, so far as he does not exceed the mandate of his writ; especially in case of a levy on realty.

CREDITOR PROCURING LEVY ON ENTIRE TRACT, of which he is part owner in conjunction with his debtor under an agreement whereby the latter, for a share in the land, is to make settlement upon the whole tract, and the former to procure title from the state, and to pay the purchase money, forfeits his rights as against a purchaser under the execution, and such purchaser obtains a good title. So notwithstanding some evidence that he knew of the agreement.

ERROR to Butler county common pleas in an action of ejectment for a tract of four hundred acres of land claimed by the

plaintiffs as heirs of John Kirkpatrick, deceased, and by the defendant as a purchaser on an execution issued on a judgment recovered by the said Kirkpatrick against one Jarvis. It was proved by the plaintiffs that in 1797 an agreement was entered into between Kirkpatrick and Jarvis, whereby Jarvis covenanted to make the settlement and improvements required by law on the tract in controversy, while Kirkpatrick covenanted to procure the title and pay the purchase money and patenting fees, Jarvis to have, for making the settlement, one hundred acres of the land. It was also proved that Jarvis made settlement and commenced improvements as stipulated by the contract. In 1811, on a judgment previously recovered by Kirkpatrick against Jarvis, an *alias test. fi. fa.* was issued to Butler county and levied on the whole tract as the property of Jarvis, and at the sale the present defendant became the purchaser. The plaintiffs tendered to the defendant the amount of the expenses and patenting money, claiming that the defendant stood in the shoes of Jarvis. It appeared that some time after the sale, the defendant said that he knew there was an agreement between Kirkpatrick and Jarvis relating to the land, but that he bought the whole tract, and so considered at the time of his purchase. It appeared, also, that the defendant made additional improvements on the land, and had procured a patent from the state for the whole tract. The plaintiffs asked instructions to the effect that the defendant by his purchase got only Jarvis' title, and took the land subject to equities in favor of Kirkpatrick, especially if he knew of the agreement. The court, however, instructed the jury, in substance, that if Kirkpatrick, under his judgment, had levied on and sold the whole tract as the property of Jarvis, and the defendant made the purchase and entered on the land without any notice from the terms of the levy or sale that Kirkpatrick claimed any part of it, and had resided on it for twenty years, and made valuable improvements, it would be inequitable and unjust for the plaintiffs to recover; and that the defendant's knowledge of the arrangement between Kirkpatrick and Jarvis was not the same as if Kirkpatrick had given him notice that he was merely levying upon and selling Jarvis' interest, and that after twenty years' possession and improvement of the land by the defendant, under the belief that he had bought the whole tract, the plaintiffs were not entitled to recover. Verdict and judgment for the defendant, and the plaintiffs sued out this writ assigning error in the instructions.

Shaler, for the plaintiffs in error.

Purviance, for the defendant in error.

By Court, GIBSON, C. J. When not transcending the mandate of his writ, the sheriff may be considered in some degree as the creditor's agent. Thus, payment to him on the foot of a *fiery facias*, discharges the debt, though the command is to get the money only by a sale of the debtor's goods; and the creditor's further recourse is to the sheriff. As to levy, time, place, and circumstances, the doing of execution is generally under the superintendence of the judgment creditor; and the sheriff acts, in these matters, so invariably by direction of the attorney, that in whatever involves an exercise of discretion based on a knowledge of particular facts, a presumption may be said to arise from the usual and natural course of such transactions, that he acted in conformity to the creditor's wishes. In particular cases, however, such as those of conflicting executions in his hands at the same time, he acts at his peril and of his own head. But in respect to no particular of his duty, does the presumption of special instruction arise with greater force, than in respect to a levy of land. The sheriff usually knows absolutely nothing about the description and quantity, or about the title; and he returns his levy according to the facts given to him by the person who sued out the execution. The creditor is the controller of it; he applies it in the way most conducive to his interest; the sheriff is bound to respect his instructions; and is not the sheriff's act, done pursuant to his command, also his act? The conclusion will not be disputed, if the fact of instruction be conceded; but it may be said that the presumption of it, being a natural one and going for just what it is worth in the estimation of a jury, is not a ground of legal inference. Granted. But if the judgment creditor has caused his own land to be levied and sold, even by inadvertence, who ought to bear the consequences of it? Evidently he whose act, however unintentionally, occasioned it, and it is impossible to say the efficient cause of the mischief, in this instance, was not the act of him who sustained the double character of execution creditor and part owner. His debtor was in the ostensible possession of a tract of four hundred acres—the statutory allowance of one who settles for his own use—but beneficially entitled only to a fourth of it, for having performed the condition of settlement for the creditor as a warrantee.

Now the whole of this tract was levied on as the absolute property of the debtor; and to prevent misconception from a measure so fraught with it, it was the duty of the creditor, in-

formed as he was of the circumstances, to furnish the sheriff with a particular description of the interest directed to be levied. It will not be said the sheriff might have disregarded an order to insert it. Had he done so, the court would have set aside the levy; and for the same reason the creditor ought to have had the error of the sheriff, if his it was, corrected in this instance; instead of which he did the very reverse. On the basis of a deceptive levy, whose falsehood stared him in the face, he sued out a *venditioni exponas*, and thus, whatever it was originally, made the act of the sheriff his own. Thus proceeding on a levy of the whole tract, and knowing, as he did, the debtor to be entitled only to a part of it, he was guilty of a constructive fraud depending, not on a natural presumption, but on facts of record whose legal consequences are determinable by the court: and what is the difference between such a judgment creditor and a by-stander who conceals his title? The one is present at the instant of the sale; the other, with knowledge of the erroneous pretension on which it is based, urges it on; but each is passive when he ought to act, and each is to be postponed to a purchaser who would else be a loser by another's supineness. On that head, the direction was entirely proper; nor in regard to the purchaser's supposed knowledge of the truth of the case, was it less so. The creditor might have had his motives for letting the whole be sold together; and it was not the purchaser's business to inquire into them; he had no reason to suppose the creditor would else be so improvident as to propose a sale of his own estate. Such a sale, however, he did propose; and the purchaser, having the assurance of the levy and *venditioni* that such was the fact, might securely bid to the value.

Judgment affirmed.

SHERIFF HOW FAR AGENT OF PLAINTIFF IN EXECUTION: See *Sims v. Campbell*, 16 Am. Dec. 595. The sheriff is, it seems, for some purposes the agent of the purchaser at an execution sale: *Farr v. Sims*, 24 Id. 396.

NORTH CANAL STREET ROAD.

[10 WATTS, 351.]

AFTER REPEAL OF STATUTE CONFERRING JURISDICTION on a particular tribunal in road matters, its confirmation of a viewer's report in favor of a road previously petitioned for is void.

CERTIORARI to the Allegheny county quarter sessions. The question was as to the validity of a confirmation of a report of

reviewers in favor of the laying out of a certain road. The proceedings were pending at the time of the passage of the act transferring the jurisdiction of the quarter sessions in such cases to the councils of Allegheny city, and the report was confirmed after that statute was enacted.

McCandless and Metcalf, for the plaintiffs in error.

Lowrie, for the defendant in error.

By COURT. Acts entirely done under a statute while it was in force, stand good after its repeal. But before these proceedings were completed, the statutory jurisdiction of the quarter sessions had been transferred to the councils of the city, by the twelfth section of the act of incorporation; and by the transfer, every thing done was made void. The sessions therefore ought to have arrested the proceeding. Order of the sessions reversed, and proceedings quashed.

REPEAL OF STATUTE, EFFECT OF ON PROCEEDINGS PENDING THEREUNDER: See *Abbott v. Commonwealth*, 34 Am. Dec. 492, and cases cited in the note thereto. Repeal of a statute conferring jurisdiction upon a court in particular cases deprives it of the right to pronounce judgment in a proceeding then pending: *Todd v. Landry*, 12 Id. 479. In *New London etc. R. R. Co. v. Boston etc. R. R. Co.*, 102 Mass. 390, Mr. Justice Gray quotes with approval the opinion in the principal case, and applies the same rule to that case, which was substantially one of the same kind.

BANK OF PITTSBURGH v. WHITEHEAD.

[10 WATTS, 397.]

QUESTION OF FACT UPON WHICH THERE IS A SPARK OF EVIDENCE must be submitted to the jury.

INFORMATION GIVEN TO BOARD OF DIRECTORS OF BANK, at a regular meeting, by one of their number, of the dissolution of a firm whose paper is subsequently offered for discount, is notice to the bank notwithstanding the absence at such meeting of the committee whose business it was to act on such matters.

ERROR to Allegheny county district court, in an action of assumpsit on certain drafts purporting to have been drawn by the defendants' firm and discounted by the plaintiff's bank, which had been protested for non-payment. The defense relied on was that the firm had been dissolved before the drafts were drawn, by the withdrawal of Christian Ihmsen, the partner who drew said drafts, and that he had therefore no authority to draw the same, of which fact the bank had notice. The evidence on

the subject of notice tended to show that several of the directors of the bank saw a published notice of the dissolution of the firm before these drafts were presented for discount, and that at a regular meeting of the board of directors some time before, when a loan had been applied for by the new firm after Ihmsen's withdrawal, one of the directors stated that Ihmsen was no longer a member of the firm, and the matter was talked over by the board. It seems that the exchange committee of the bank was not present at that meeting. The court below instructed the jury, among other things, that actual notice of the dissolution must be brought home to the plaintiffs, as they had had previous dealings with the firm, but that if the jury believed that several members of the board of directors had knowledge of the dissolution, they were at liberty to infer actual knowledge of that fact by the bank; much more if they believed that information upon that point was communicated to the board at a regular meeting, and that the fact that the exchange committee who discounted the paper had no knowledge of the dissolution would make no difference. The charge was excepted to, and error assigned therein after verdict and judgment for the defendants.

Dunlop, for the plaintiff in error.

Forward, for the defendants in error.

By Court, GIBSON, C. J. Where there is a spark of evidence, the question of fact must be submitted to the jury as the legitimate triers of it. In this instance the evidence would be ample to affect a natural person with notice of the dissolution; but the party to be affected is a corporation. Notice to an individual corporator, if he be not constituted by the charter or by-laws an organ of communication betwixt the corporation and those who deal with it, is not notice to it, because any presumption that he delivered what he had received to the body, would be rebutted by the fact that it was not his duty to do so. He might choose to leave that business with the person officially charged with it, and thus leave the corporation in possession of the rights and advantages which arose from imputed ignorance. But notice to the government, or head, is necessarily notice to the body; because it is to be approached by strangers only through the medium of its government, or else some organ or branch of it, specially deputed to represent it; and the government, or its deputy, is consequently the channel through which it is to receive formal or official notice. Now the government of a bank resides in a select body, called president and directors;

and no matter how the duties of its individual members may be parceled out among themselves, it is still the president and directors in the aggregate with whom strangers have to do, and by whom all corporate acts are to be performed. Where indeed the charter, a by-law, or inveterate custom has authorized the executive officers of a bank to act for it, they may bind it by their reception of notice as well as by any other act within the scope of their power; but notice directly to the principal, is necessarily as effective as if it were given to the agent, in order that it might be delivered by him to the principal. Publication of dissolution in a newspaper, taken by the officers, and paid for by the bank, may not be constructive notice to a bank which had, as in this instance, previously dealt with the firm; but when the fact of dissolution, gleaned from that, or any other source, is stated before the board by a member of it, and made a subject of conversation during the very transaction, it is impossible to doubt that the bank is to be affected, because knowledge of the fact material to be known is a part of the *res gesta*. There can not be a question, therefore, that knowledge imparted to the board, as was done here, by a director at a regular meeting, is notice to the bank. As to the absence of the exchange committee, whose function it was to act on the basis of the information, it is enough that it was the business of the board, and not of the party treating with it, to give its subordinate the necessary instruction. The power which appoints a committee is the proper one to direct it, and inform it of whatever is necessary to be known. The committee, in this instance, was the peculiar organ of the board; and even if it had been competent to receive a formal notice, still notice communicated to the principal must be deemed equally operative. There was, therefore, evidence of actual notice to be left to the jury.

Judgment affirmed.

NOTICE TO OFFICER OR AGENT OF CORPORATION AFFECTS CORPORATION, WHEN.—The general rule that notice to an agent within the scope of his agency, and respecting a matter in which he is authorized to represent his principal, is notice to the principal, is undoubted: Whart. on Agency, secs. 177, 178; Story on Agency, sec. 140; *Jackson v. Sharp*, 6 Am. Dec. 267. Nor is it to be doubted that this rule applies to the agents of corporations as well as to those of other principals: Whart. on Agency, secs. 183, 184; Story on Agency, sec. 140a; Ang. & Ames on Corp., sec. 305. Indeed there are peculiar and urgent reasons for a more stringent enforcement of the rule against corporations than against individual principals, from the fact that the only way of communicating actual notice to a corporation is through its agents: *Fulton Bank v. New York etc. Canal Co.*, 4 Paige's Ch. 127. "A corporation

can not see or know anything except by the eyes or intelligence of its officers:" *Factors etc. Co. v. Marine Dry Dock etc. Co.*, 31 La. Ann. 149. Whenever, therefore, notice or knowledge of a particular fact would impose upon a private person any duty or liability, a like duty or liability will be devolved upon a corporation by similar notice or knowledge on the part of its authorized agent as to a matter within the line of his duty. To quote again from the case last cited: "Where knowledge in any form will suffice, a corporation must be held to know what its president and chief officers know."

Before entering upon a discussion of the cases respecting the effect of notice given to particular classes of corporate officers and agents, it will be useful to consider some of the general principles applicable to all such officers and agents.

OFFICER OR AGENT MUST HAVE NOTICE IN HIS REPRESENTATIVE CHARACTER, or the corporation will not be bound. In other words, as already stated, he must have the notice while acting for his principal, and it must relate to a matter within the scope of the agency: *Bank v. Schaumborg*, 38 Mo. 228; *Congar v. Chicago etc. R. R. Co.*, 24 Wis. 157; S. C., 1 Am. Rep. 164. The agent must have authority, and it must be his duty, to act upon the subject of the notice, or it will not be binding: *Bank of Virginia v. Craig*, 6 Leigh, 399. This rule is important, and has a special application to corporate agents owing to the distribution of duties among them. Notice of the dishonor of a note given to the porter of a bank, or notice of stoppage of goods *in transitu* served upon a brakeman upon the carrier's train, would, of course, be ineffectual. Upon the same principle, where a railroad company is sought to be charged with negligence in the shipping of goods to a wrong town, where there are two towns of the same name in a state, evidence that the agents of the company in the state to which the goods were sent knew the place intended, is inadmissible where it is not shown that the agents in another state, who shipped the goods, possessed any such knowledge: *Congar v. Chicago etc. R. R. Co.*, 24 Wis. 157; S. C., 1 Am. Rep. 164.

In the case of a banking corporation, it is laid down in *Bank of Virginia v. Craig*, 6 Leigh, 399, that notice of any fact, to be effectual, must be communicated to the very officer who has charge of that department of the bank's business. "Notice is to be given," says Tucker, P., in that case, "to that officer within whose appropriate sphere the transaction falls: Thus, if one desire to stop the payment of a check, he must go to the cashier and not to the president; and if he wish to arrest the transfer of stock, he must go to the transfer clerk and not to the bookkeeper." This rule is, however, entirely too stringent, as is well said in a recent valuable article on this subject in 6 Southern Law Review, 799. It would obviously be most unjust to demand that all persons having dealings with a bank should be so accurately informed as to the precise duties of every officer of the corporation, as such a rule would require. But it would be equally unjust to hold the bank bound by notice given to a subordinate employee respecting a matter which every person of common intelligence ought to know does not fall within such employee's sphere of action. Thus, in case of a note left for collection where it is claimed that the bank has been guilty of laches in transmitting notice of non-payment to an indorser to a wrong address, it would be clearly wrong to charge the bank with notice of the indorser's true residence because that fact happened to be known to one of the clerks in the institution: *Goodloe v. Godley*, 21 Miss. 233.

MERE PRIVATE, UNOFFICIAL INFORMATION or knowledge acquired by an officer of a corporation, casually or by rumor or through channels open alike

to all, as to matters upon which such officer is not required to act, is clearly not notice to the corporation if not communicated by such officer to the proper authorities in the institution: *United States Ins. Co. v. Shriver*, 3 Md. Ch. 381; *Winchester v. Baltimore etc. R. R. Co.*, 4 Md. 231; *Bank of Virginia v. Craig*, 6 Leigh, 399; *Mechanics' Bank v. Schaumburg*, 38 Mo. 228; *Miller v. Illinois Central R. R. Co.*, 24 Barb. 312. These and other cases relating to this point will be further examined when we come to discuss the question of notice to particular officers of corporations. It is proposed here simply to ascertain the general rule upon the subject. In some of the cases it is held that private information acquired by one who is not at the time acting as agent for a corporation is not notice to the corporation even though the person acquiring the information is subsequently called upon to take action upon the same matter as officer or agent of the corporation. Thus, in *Houseman v. Girard etc. Association*, 81 Pa. St. 256, it is decided that knowledge acquired by a party before becoming agent of a corporation can never be notice to the corporation after the inception of the agency. "Notice to him twenty-four hours before the relation commenced," say the court in that case, "is no more notice than twenty-four hours after it ceased would be. Knowledge can be no better than direct actual notice." This is the rule laid down also in *Story on Agency*, sec. 140. But the later and better considered cases show that this is not the correct doctrine. Any knowledge or information possessed by an agent at the time of acting as agent for a corporation, with respect to the matter upon which he is to act, is notice to the corporation, whenever and however such knowledge or information may have been acquired, except in cases where express, formal notice is required to charge the principal. The point to be regarded is whether the agent actually had the knowledge or information at the time of acting. There is no practical distinction between individual knowledge and official knowledge in such cases: *Bridgeport Bank v. New York etc. Co.*, 30 Conn. 231. This principle is very clearly and satisfactorily stated by Green, J., in *Union Bank v. Campbell*, 4 Humph. 394. In delivering the opinion of the court in that case, after some preliminary remarks he says:

"We do not intend to controvert the general doctrine, that 'notice must come to the agent while he is concerned for the principal, and in the course of the same transaction,' for notice to a party while he is not acting as agent is certainly no notice to a principal for whom he may afterwards act. But the existence of knowledge in an agent, when acting for his principal, is notice to the principal, however that knowledge may have been acquired. Thus, if an agent, in his own transaction, has had notice of a fact, that notice does not reach his principal, because he is not then acting for his principal; and before he comes to act as such agent, in relation to the subject about which he had notice, he may have forgotten the whole matter; so that it was never present in his mind while discharging the duties of his agency. But if he had received the notice while concerned for the principal, the principal would be bound by it, though the agent might forget the facts, and have no memory of them during the transaction to which they relate. But certainly, if, while an agent is concerned and acting for his principal, he have knowledge of the facts, in relation to which notice is necessary, there can be no necessity for giving formal notice of the same facts to the individual who already knows them. It would be very absurd to assume, that although every director may have notice of the dissolution of a partnership, and while on the board considering the propriety of discounting a note that purports to have been indorsed by the firm, they speak to each other of the fact of disso-

lution; yet, because notice of the dissolution was not communicated to them while thus concerned in this transaction, the bank had no notice, and the retiring partner is bound."

That was, as appears from the above extract, a case in which it was sought to affect a bank with notice of the dissolution of a partnership, the fact being known to certain of the directors who were present and acted in the board on the discount of a certain note, purporting to have been indorsed by the firm. The court held that it was not necessary to show affirmatively that the directors to whom the fact of the dissolution had been previously communicated remembered it at the time of acting on the note, but that the jury might infer from the circumstances that they did remember it. The same doctrine was applied in *Fairfield etc. Savings Bank v. Chase*, 11 Rep. 809, in the Maine supreme court. In that case it appeared that certain information affecting a matter upon which an agent of a corporation was called upon to act had been acquired by him before the inception of the agency, and the question was, whether the corporation was chargeable with notice of what was thus known to the agent. Mr. Justice Peters, delivering the opinion of the court, after criticising *Houseman v. Girard etc. Association*, 81 Pa. St. 258, referred to above, thus stated the true rule: "The knowledge must be present to the mind of the agent when acting for the principal, so fully in his mind that it could not have been at the time forgotten by him; the knowledge or notice must be of a matter so material to the transaction as to make it the agent's duty to communicate the fact to his principal; and the agent must himself have no personal interest in the matter which would lead him to conceal his knowledge from his principal, but must be at liberty to communicate it. Additional modification might be required in some cases. These elements appearing, it seems just to say that a previous notice to an agent is present notice to the principal." In *Hart v. Farmers' Bank*, 33 Vt. 252, also, information acquired by an agent of a corporation before the relation commenced, as to a matter upon which he was afterwards called upon to act, was held to convey notice to the corporation. See, also, other cases referred to in the note to Story on Agency, sec. 140. Of course private information acquired by an agent during the continuance of the relation respecting a matter upon which the corporation is called upon to act after the agent has ceased to be agent, is not notice to the corporation: *Platt v. Birmingham Axle Co.*, 41 Conn. 255. So, even where the information is acquired by the agent incidentally in the discharge of his duty as agent. Thus a railway company is not chargeable with knowledge acquired by a former officer or agent, as to the arbitrary marks of a consignee of goods, where there is no proof that the information was acquired through any usage, custom, or course of business of the company relating to the matter: *Great Western Railway v. Wheeler*, 20 Mich. 419.

KNOWLEDGE POSSESSED BY OFFICER DEALING WITH CORPORATION.—The foundation principle upon which rests the doctrine that a party, whether an individual or a corporation, is chargeable with notice imparted to his agents in the line of their duty, is that agents are presumed to communicate all such information to their principals because it is their duty so to do. The principal is conclusively presumed to know whatever his agent knows if the latter knows it as agent. Of course no such presumption can exist where the agent is dealing with the corporation in the particular transaction in his own behalf: 6 Southern L. Rev. 816. In such transactions the attitude of the agent is one of hostility to the principal. He is regarded as a stranger. There is no privity between him and the principal. He is dealing at arm's

length. It would be absurd, therefore, to suppose that he would communicate to the principal any facts within his private knowledge, affecting the subject of the dealing, unless it would be his duty to do so if he were wholly unconnected with the principal. Hence, whenever it appears that an officer or other agent of a corporation is transacting business with the corporation for himself in the same way as any other person might do, the law will not impute to the corporation any knowledge of his relating to the matter in hand. As was said by the court in *Wickersham v. Chicago Zinc Co.*, 18 Kan. 481: "Neither the acts nor knowledge of an officer of a corporation will bind it in a matter in which the officer acts for himself and deals with the corporation as if he had no official relations with it." Or, as was said in *Barnes v. Trenton Gas Light Co.*, 27 N. J. Eq. 33, his interest is opposed to that of the corporation, "and the presumption is, not that he will communicate his knowledge of any secret infirmity of the title to the corporation, but that he will conceal it." This doctrine is applied to the case of a president or director conveying land to a corporation having notice of a secret defect in the title: *Barnes v. Trenton Gas Light Co.*, 27 N. J. Eq. 33; *La Forge Fire Ins. Co. v. Bell*, 22 Barb. 54; *Lyne v. Bank of Kentucky*, 5 J. J. Marsh. 545. So to the case of a director procuring the discount of a note for his own benefit having knowledge that it is founded upon an illegal consideration: *First National Bank of Hightstown v. Christopher*, 40 N. J. L. 435; 8 C., 8 Rep. 403; 8 Cent. L. J. 181; or that it was made for his accommodation: *Commercial Bank v. Cunningham*, 24 Pick. 270; or that it was obtained under a false pretense of having it discounted for the maker: *Washington Bank v. Lewis*, 22 Pick. 24; or that it was affected in his hands with certain conditions: *Louisiana State Bank v. Senecal*, 13 La. 525; or with a claim of recoupment of which the bank had no notice: *Loomis v. Eagle Bank of Rochester*, 1 Dian. 285; or with other equities: *West Boston Savings v. Boston*, 124 Mass. 506. So to the case of a cashier negotiating a note to the bank which he had procured for a different purpose, the bank having no notice of the misapplication: *Seneca County Bank v. Nease*, 5 Denio, 329. The same principle ruled *In re European Bank*, L. R., 5 Ch. App. 358, where the manager of the bank abstracted certain moneys belonging to it and purchased therewith certain overdue bills which he afterwards sold to another bank of which he was sole director, and it was determined that the second bank had not constructive notice of the fraud affecting the title to the bills. On this subject the court said, speaking of the director: "He can not be taken to have disclosed his own fraud." In *First Nat. Bank v. Gifford*, 47 Iowa, 575, an arrangement was made between the president and cashier of a bank whereby the latter was to borrow money from the bank to purchase stock therein, giving his note therefor indorsed by the president, with the understanding that the bank should hold the stock as collateral security to the president to protect his indorsement. The cashier having secretly sold the stock to another party, the bank issued new certificates to the purchaser notwithstanding notice of the agreement given to it by the president after the sale and after the president had ceased to be an officer of the bank. In a subsequent action brought by the bank against the former president as indorser of the cashier's note, it was decided that the knowledge possessed by the president and cashier at the time of the loan, as to the arrangement between them, could not affect the bank with notice, because they were acting for themselves in that transaction, and not for the bank. Seevers, J., delivering the opinion, said: "The proposition is rather a strange one, if the defendant and Porter [the cashier] could act for themselves and the bank in

and about the same transaction at the same time, and equally protect the interests of both; or that, while so acting, they could, by notice to each other, bind the bank hand and foot without at least advising with or notifying any other officer of the institution."

It will be noticed that in all these cases the corporate agent was not acting in his official character in the particular transaction. The fact of his agency was merely incidental. It is obvious that the same rule can not be applied where the agent acts officially upon a matter in which he has a personal interest, even though such interest is adverse to that of the corporation. In such cases it is his duty, notwithstanding his interest, to communicate to his company any facts in his possession, material to the transaction, and the law will therefore presume, in favor of third persons, that he made such communication. This, it seems to us, is the principle to which are to be referred those cases, hereafter to be mentioned, in which corporations have been held to be affected with notice of facts known to some of their directors acting officially upon matters in which they had a personal interest. So, also, cases of fraud.

WHERE THE AGENT OR OFFICER OF A CORPORATION IS ALSO AGENT OF ANOTHER CORPORATION OR PERSON, and there are mutual dealings between the principals through the intervention of such agent, the question as to whether either principal is to be affected with notice of what is known to the officer or agent by virtue of his relation to the other principal, will depend upon circumstances. If the knowledge is such as the principal himself, if present, would not be bound to communicate, there would seem to be no reason why the agent should be presumed to have communicated it. Thus, if one of two corporations having a common officer, borrows money of the other, through the intervention of such officer, for a purpose which is illegal, or enters into a contract which is *ultra vires*, the other corporation ought not to be charged with notice of the facts: *In re Marseilles etc. Co.*, L. R., 7 Ch. App. 161; *In re Contract Corporation*, L. R., 8 Eq. 14. The two corporations are dealing in such a case as strangers, and the fact that they have a common officer or other agent, ought to make no difference in the transaction. There is in reality in such a case a conflict of duty on the part of the agent. He has knowledge of certain facts which it is his duty to one principal to conceal, and to the other to communicate. There can, therefore, be no presumption either way, and the question of notice depends upon whether he did in fact communicate the information. But where it is the interest of the principal from whom he received the information to communicate it to the other, it ought to be presumed that he did so. Therefore notice should be inferred against the principal with whom the transaction was had. Thus in *Gale v. Lewis*, 9 Q. B. 730, a creditor instructed his attorney, who was also agent of an insurance company, to procure an insurance upon his debtor's life as security for a loan; and on the debtor's subsequently becoming bankrupt, his assignees claimed the benefit of the policy. The court held, however, that the policy did not pass by the assignment in bankruptcy, but that the creditor was entitled to the same, as a prior assignee, of whose claim the insurance company had notice. It was argued that the communication was made by the creditor to his attorney as attorney, and not as agent of the insurance company, but the jury having found that the agent had authority to receive notices of assignments, Lord Denman, C. J., declared that the two capacities of agent and attorney being "united in one person, a notice received in one capacity for the purpose of being transmitted to the other is an effectual notice in both capacities." Here, it will be perceived, it was the agent's

duty to both principals to communicate to the company the information in his possession.

WHERE IT IS STIPULATED THAT NOTICE SHALL NOT BE GIVEN to a corporation of facts communicated to one of its officers, there is no presumption that notice will be given notwithstanding the interdiction. There is no case, therefore, for implied notice. Thus, where the cashier of a bank makes a loan, under the direction of the president, to a party whom the latter knows to be insolvent, but is persuaded by the president not to communicate the facts, there is no notice: *First Nat. Bank v. Reed*, 36 Mich. 263. See also *Ex parte Nutting*, 2 Mont. D. & De G. 302.

NOTICE OF FRAUD OF AGENT.—Where an officer or agent of a corporation takes advantage of his official position to perpetrate a fraud upon a third person, acting at the time in his official character upon a matter within the sphere of his duty, the corporation must be presumed to have notice of all facts within his knowledge affecting the validity of his act: 6 Southern Law Review, 821. Although in cases where there is no fiduciary relation, it will not be presumed that a person will disclose his own fraud, no such presumption can be indulged here against the counter presumption that an agent has communicated to his principal all material facts known to him affecting a transaction in which he is acting as such agent in the line of his duty. For the protection of third persons it must rather be presumed that the principal has authorized the agent's act, with notice of the fraud. Thus a bank is chargeable with notice of facts vitiating the title to securities obtained by the collusion of its teller with an officer of another bank, by certifying as "good" the check of an irresponsible person, which is taken up by such other bank: *Atlantic Bank v. Merchants' Bank*, 10 Gray, 532. So, where the treasurer of a town, being also cashier of a bank, gave a note, as such treasurer, to raise money for his private use, which note was discounted by him as cashier, the bank was held bound by his knowledge of the fraud: *Bank of New Milford v. Town of New Milford*, 36 Conn. 93. So where the cashier of a bank, being treasurer of another corporation, deposited securities of the latter to obtain a loan for the bank: *Fishkill Savings Inst. v. Bostwick*, 19 Hun, 354. The same principle was applied in *Holden v. New York etc. Bank*, 72 N. Y. 286, to a fraud committed by the president and sole manager of an insolvent bank, in causing the transfer of certain shares held by him in such bank, through a third person, to an estate of which the president was executor, paying therefor by a check drawn against funds of the estate deposited in the bank. The whole transaction being necessarily within his official knowledge, the bank was charged with notice of the fraud.

NOTICE TO THE PRESIDENT OF A CORPORATION who is also its general agent, addressed to him in his official character, as to any matter within his supervision, is of course notice to the corporation: *Smith v. Board of Water Commissioners*, 38 Conn. 208. So any knowledge or information acquired by him in the course of his official duty relating to the business of the corporation under his control: *Van Lewan v. First National Bank*, 6 Lans. 373; *Mechanics' Bank v. Schaumberg*, 38 Mo. 228. So knowledge possessed or acquired by a bank president in connection with the discount of a note, as, for instance, his knowledge of the residence of an indorser thereon, notwithstanding his accidental absence at a particular time: *Central National Bank v. Levin*, 6 Mo. App. 543. Express notice to the president of a bank, sufficient to put him upon inquiry, that stock held by a stockholder is held in trust for another, is notice to the bank: *Porter v. Bank of Rutland*, 19 Vt. 410. But in *Bank of Virginia v. Craig*, 6 Leigh, 399, it was held that notice served by the sureties of a

guardian upon the president of a bank in a suit brought against the guardian and ward and the president and directors of the bank, but not against the bank by its corporate name, to restrain the sale of stock held by the ward in the bank, was not notice to the bank, because the president had no official control over that matter. This case, however, is shown in 6 Southern Law Rev. 799, 800, to be clearly contrary to the doctrine laid down by Gibson, C. J., in *Bank of Pittsburgh v. Whitehead*, that notice to the head of a corporation is necessarily notice to the corporation. Granting it to be true that the president alone had no control over the "transactions of holders of stock," as stated in that case, it would certainly seem to have been his duty to communicate the information possessed by him to the board of directors, who, with himself, had such control. Notice to the president of a mining company respecting the acts of one who assumes to act for it without authority is notice to the corporation, where the president has general control over its affairs, and the corporation can not be heard to say that the president received the information as an individual, and not officially: *Union Mining Co. v. Rocky Mountain National Bank*, 2 Col. 248. Information upon which a corporation is required to act for the protection of its interests under penalty of being estopped by its non-action, if possessed by an officer who has power to act at the time when action is required, would seem necessarily to be notice to him in his official character, and therefore notice to the corporation, however such information may have been acquired. But, as stated elsewhere in this note, mere casual private knowledge by the president of a corporation as to a matter upon which he is not called upon to act, is not notice to the corporation: *Mechanics' Bank v. Schaumburg*, 38 Mo. 228; *Miller v. Illinois Central R. R. Co.*, 24 Barb. 312; as where he learns incidentally, as agent of a firm of which he is a member, that the firm has made a conditional contract for the sale of stock in the corporation of which he is president, "without any intimation, however, that it was intended or designed to give notice to him or the company, or that he as president or the company as his principal should take notice of it or regard it:" *Miller v. Illinois Central R. R. Co.*, *supra*. If, however, a firm of which the president of a corporation is a member, after having pledged to one party certain shares of stock in the corporation, have those shares canceled and others issued in their stead, signed by the president, which they pledge to other parties, the corporation is chargeable with notice of the first pledgee's rights, because the president, having knowledge of them, took official action in issuing the new shares: *Factors' etc. Ins. Co. v. Marine Dry Dock Co.*, 31 La. Ann. 149. Evidence tending to show that the president of an insurance company saw a newspaper notice of the time of sailing of an insured vessel is admissible in an action on the policy, where that fact is material: *Green v. Merchants' Ins. Co.*, 10 Pick. 402. In such a case, although the information is acquired casually, it unquestionably relates to a matter upon which the president acts officially. It therefore comes within the rule already laid down.

NOTICE TO DIRECTORS AS A BODY.—The directors of a corporation collectively constitute, with the president, the governing power, as stated by Gibson, C. J., in the principal case. They have general superintendence and control over the affairs of the corporation. There can, therefore, be no question that notice or information regarding any matter upon which the corporation is required to act communicated to the directors when assembled as a board, is notice to the corporation: *Angell & Ames on Corp.*, sec. 306; *Fulton Bank v. New York etc. Canal Co.*, 4 Paige, 127; *Ex parte Agra Bank*, L. R., 3 Ch. App. 555. "As a general rule," say the court in *Toll Bridge Co. v. Bet-*

worth, 30 Conn. 390, "what the directors know regarding matters affecting its interests the corporation knows." Nor does a change in the board of directors after it has received notice make any change in the effect of the notice. Therefore, notice given to a previous board that certain stock is held by a party as trustee is binding upon a succeeding board and upon the corporation: *Mechanics' Bank v. Seton*, 1 Pet. 290.

NOTICE TO INDIVIDUAL DIRECTORS.—The cases respecting the effect of notice or information communicated to one or more directors of a corporation are very conflicting, and seem to be almost irreconcilable, unless it be upon the principles already indicated in this note. In some cases it is held that the "directors are not officers of a bank in a proper sense, nor have they individually any power or control in the management of its concerns; they act collectively and at stated times, and have otherwise no more to do with the general management of the institution than the other stockholders:" *Louisiana State Bank v. Senecal*, 13 La. 525. The legitimate inference from this argument is that notice to a single director, or to any number of individual directors, or to all of the directors individually, can in no case be notice to the corporation unless actually communicated to the board of directors as a body. At least under such a rule notice to individual directors constituting less than a majority of the board would be ineffectual. It is to be noted, however, in passing, that in the case last cited it was not necessary to lay down any such sweeping doctrine. That was a case in which it was sought to charge a bank with notice of equities affecting a certain note which were known to one of the directors. It was decided that the bank was not affected with notice, but as it appeared that the note was discounted for the benefit of the director who possessed the information respecting it, and that, although present at the board, he took no part in the discount of the note, the decision may be upheld without resorting to any such extreme rule as that notice to a single director can never be notice to the bank. Indeed, considerable stress was laid upon the fact that the director had an interest in suppressing the information.

A similar doctrine to that of *Louisiana State Bank v. Senecal*, *supra*, is laid down by Depue, J., *arguendo*, in *First Nat. Bank of Hightstown v. Christopher*, 40 N. J. L. 435; S. C., 8 Rep. 403; 8 Cent. L. J. 181, where he says: "The directors of a corporation are not individually its agents for the transaction of its ordinary business, which is usually delegated to its executive officers, such as the president or cashier. Directors are possessed of extensive powers, even to the extent of absolute control over the management of its affairs, but these powers reside in them as a board; and, when acting as a board, they are collectively the representatives of the corporation. Notice to directors, when assembled as a board, would undoubtedly be notice to the corporation." It is, however, conceded in that case that there are certain decisions in which notice to a single director has been held effectual, though not communicated to his colleagues, where such director has been called upon to act and has acted with the board on the matter as to which he had notice.

Although it is unquestionably true that an individual director, not clothed with any special agency in a particular transaction, can not bind the corporation except by acting officially with his colleagues, it would seem to be reasonable that he should be regarded as, in some measure, an organ of communication between the board and third persons, with respect to matters upon which the board has power to act, and that where a notice is given to him, officially, "for the purpose of being communicated to the board," with

respect to any such matter, the corporation should be held to be charged with the notice whether it is actually communicated to the board or not. This is the doctrine laid down in *United States Ins. Co. v. Shriver*, 3 Md. Ch. 381; *General Ins. Co. v. United States Ins. Co.*, 10 Md. 527; *Boyd v. Chesapeake etc. Canal Co.*, 17 Id. 195. It is undoubtedly the duty of a director receiving such notice to communicate it to his colleagues: *Story on Agency*, sec. 140b; and ought he not to be conclusively presumed to have done so where the rights of strangers to the corporation are to be affected? It must be admitted, however, that this doctrine is disapproved by Judge Story in his work on agency, sec. 140a.

Another class of cases, in which corporations have been charged with notice of facts known to one or more directors and not communicated to the board, are those in which the director having such knowledge acts as a member of the board upon the very matter affected thereby, whether such knowledge is acquired privately or in the course of the business of the corporation; as where a director of a bank having notice of some equity affecting the validity of a note acts with the board in the discount of such note: *Union Bank v. Campbell*, 4 Humph. 394; *Bank of United States v. Davis*, 2 Hill, 451; *Clerks' Savings Bank v. Thomas*, 2 Mo. App. 367; *National Security Bank v. Cushman*, 121 Mass. 490. So even where such note is discounted for the benefit of the director possessing the knowledge, or of a firm of which he is a member: *Bank of United States v. Davis*, 2 Hill, 451; *North River Bank v. Aymar*, 3 Hill, 262. A contrary doctrine is laid down in *Custer v. Tompkins County Bank*, 9 Pa. St. 27, and *Terrell v. Branch Bank of Mobile*, 12 Ala. 502, the latter being a case in which a director to whom a note was sent for discount, with a blank for the amount which was to be filled by a certain sum, filled the blank with a larger sum and had the note discounted for his own benefit, himself acting with the board in the discounting of it. Mr. Justice Story also seems inclined to the opinion that the fact that a director having private knowledge of equities affecting the validity and acts upon the board in discounting it, ought not to charge the corporation with notice of such equities: *Story on Agency*, sec. 140b. But see 6 Southern L. Rev. 814. It seems to us, in accordance with the rule already laid down, that a director acting upon the discount of a note with knowledge of a secret infirmity in it, should be regarded as acting as agent for the corporation, and that the corporation should be charged with notice of the facts known to him, though not communicated to the board; and that the same rule should apply even where the director so acting is personally interested in the note, for, in our view, that fact can make no difference, where the director interested acts in his official capacity, for the corporation, in discounting the note.

As already stated, however, there can be no question that the mere private knowledge of one or more directors of a corporation not communicated to the board, concerning any business in which the corporation is interested, such as unrecorded liens upon lands conveyed or mortgaged to the corporation, or secret equities affecting notes discounted by it, or the like, where such directors have no official duty to perform in regard to the matter concerning which they possess such knowledge, and where they do not take any part in the transaction on behalf of the corporation, does not affect the corporation with notice of the facts known to such directors: *Lucas v. Bank of Darien*, 2 Stew. 280; *Farmers' etc. Bank v. Payne*, 25 Conn. 444; *Farrell Foundry v. Dart*, 26 Id. 376; *Mercier v. Canonge*, 8 La. Ann. 37; *Fairfield Savings Bank v. Chase*, 11 Rep. 809 (Me.); *Winchester v. Baltimore etc. R. R.*

Co., 4 Md. 231; *General Ins. Co. v. United Ins. Co.*, 10 Id. 517; *United States Ins. Co. v. Shriver*, 3 Md. Ch. 381; *Sawyer v. Planters' Bank*, 6 Allen 207; *National Bank v. Norton*, 1 Hill, 572; *Fulton Bank v. New York etc. Canal Co.*, 4 Paige, 127; *Western Bank v. Cornen*, 37 N. Y. 320; *Atlantic Bank v. Savery*, 18 Hun, 36; S. C., 82 N. Y. 291; *First Nat. Bank of Hightstown v. Christopher*, 40 N. J. L. 435; S. C., 8 Rep. 403; 8 Cent. L. J. 181; *Jones v. Planters' Bank*, 9 Heisk. 455; *In re Carew's Estate Act*, 31 Beav. 39; *Ex parte Burbridge*, 1 Deac. 131; *Ex parte Watkins*, 2 Mont. & A. 348; *Powles v. Page*, 3 Com. B. 16; *Purviance Railway Co. v. Thames etc. Ins. Co.*, L. R., 2 Ch. 617; *Angell & Ames on Corp.*, sec. 308. See also a valuable article on the subject of "Notice to Directors of Corporations," 6 Southern L. Rev. 45.

Where the director of a corporation was the managing director of such corporation, and certain shares of stock in the corporation were deposited with him by a shareholder, as security for an accommodation indorsement by such director, the corporation was held to have notice of the assignment so as to prevent the passing of the title to the shares to the assignees in bankruptcy of the shareholder: *Ex parte Harrison*, 3 Mont. & A. 506. Here, however, it is clear that there was superadded to the ordinary functions of a director the further duties of a general manager for the corporation. He was himself, therefore, the proper officer to receive notice of the assignment.

NOTICE TO CASHIER OF BANK.—The cashier of a bank is its general executive officer in conducting its pecuniary operations and managing all its concerns except such as are committed peculiarly to the bank directors: *Fleckner v. Bank of United States*, 8 Wheat. 338; *Bank of Pennsylvania v. Reed*, 1 Watts & S. 106; *Angell & Ames on Corp.*, sec. 300. Therefore, notice to him of a prior incumbrance on land mortgaged to the bank is notice to the bank: *Trenton Banking Co. v. Woodruff*, 2 N. J. Eq. 117. So, notice to him of a loan of the funds of the bank deposited in another bank: *New Hope etc. Co. v. Phenix Bank*, 3 N. Y. 156. So, notice or knowledge on his part that stock standing in the name of a borrower from the bank is held in trust: *Harrisburg Bank v. Tyler*, 3 Watts & S. 373; *Duncan v. Jaudon*, 15 Wall. 165. So, notice or knowledge that a stockholder has pledged his stock where a note of such stockholder is subsequently discounted by the bank: *Bank of America v. McNeil*, 10 Bush, 54. So, knowledge that the indorsement of a note in the name of a partnership was fraudulently made by one of the partners to pay his separate debt: *Full River Bank v. Sturtevant*, 12 Cuah. 372. So, notice by a surety on a note held by the bank to sue the principal: *Bank of St. Mary's v. Mumford*, 6 Ga. 44. So, notice by a debtor of the bank of his acceptance of certain modifications of a proposition by him to pay his debt in state bonds: *Branch Bank at Huntsville v. Steele*, 10 Ala. 915.

NOTICE TO OTHER AGENTS OF PRIVATE CORPORATIONS.—The treasurer of a corporation, being held out to the world as the proper agent to whom a payment to the corporation is to be made, is to be deemed also the proper agent to whom to give notice of the purpose for which such payment is made: *New England Car Spring Co. v. Union India Rubber Co.*, 4 Blatchf. 1. Notice of non-acceptance or non-payment of a draft drawn by an officer of a corporation having authority to draw such drafts may be given to such officer: *Conro v. Port Henry Iron Co.*, 12 Barb. 27. The principal manager of a bank, whether he be the president, a director, or other officer, having supervision and general control of its affairs, his knowledge that an acceptance discounted by the bank was fraudulently obtained is, of course, notice to the bank: *In re Carew's Estate Act*, 31 Beav. 39. The transfer agent of a corporation is the

proper agent to receive notice of transfers of stock. His knowledge, therefore, though privately obtained, as to a particular transfer of stock, is notice to the corporation so as to render it liable for permitting a subsequent transfer to another party: *Bridgeport Bank v. New York etc. R. R. Co.*, 30 Conn. 231; *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 31. The transfer agent acts officially in such a case in making the subsequent transfer. Notice to the master of transportation of a railway company, who has authority to employ and discharge conductors, respecting the incompetence of a particular conductor, is notice to the corporation: *Pittsburgh etc. R. R. Co. v. Ruby*, 38 Ind. 294. So notice to the superintendent of a mining company respecting the unsafe condition of the roof of the mine, in an action against the company for negligence, whereby one of its servants was killed, is admissible as evidence of notice to the corporation: *Quincy Coal Co. v. Hood*, 77 Ill. 68. So notice given to the engineer of a bridge company by contractors, concerning an alteration in the structure, is deemed notice to the company: *Danville Bridge Co. v. Pomroy*, 15 Pa. St. 151. The knowledge of an insurance agent, through whom an insurance is effected, of facts material to the risk, constitutes notice to the insurance company: May on Ins., secs. 132, 142; *Campbell v. Merchants' Ins. Co.*, 37 N. H. 35; *People's Ins. Co. v. Spencer*, 53 Pa. St. 353; *Combs v. Shrewsbury Mut. Fire Ins. Co.*, 34 N. J. Eq. 403; *Brink v. Merchants' Ins. Co.*, 49 Vt. 442; *Beal v. Park Ins. Co.*, 16 Wisc. 241; *May v. Buckeye Mut. Ins. Co.*, 25 Id. 291; *Humphry v. Hartford Fire Ins. Co.*, 15 Blatchf. 504; *Gouinlock v. Manufacturers' Ins. Co.*, 43 U. C. Q. B. 563. As, where the agent has knowledge of facts respecting the title which are not stated in the application: *Marshall v. Columbian Mut. Fire Ins. Co.*, 27 N. H. 157; *Van Schoick v. Niagara Fire Ins. Co.*, 68 N. Y. 434. So where the agent has knowledge of facts not stated respecting the condition of chimneys, and as to the building containing a steam-engine or that petroleum is kept there: *Simmons v. Insurance Co.*, 8 W. Va. 474; *Campbell v. Merchants' Fire Ins. Co.*, 37 N. H. 35; *Bennett v. N. B. & M. Ins. Co.*, 81 N. Y. 273. So, also, notice to an insurance agent of other or subsequent insurance on property insured in his company, is notice to the company: *Putnam v. Commercial Ins. Co.*, 18 Blatchf. 368; *Schenck v. Mercer Co. etc. Ins. Co.*, 24 N. J. L. 447; *Hayward v. National Ins. Co.*, 52 Mo. 181; *Brandup v. St. Paul Ins. Co.*, 10 Ins. L. J. 228; S. C., 27 Minn. 393. But notice of other insurance is not effectual under a condition requiring consent to be indorsed on the policy, unless such notice is given to an agent authorized to act upon it by canceling the policy or indorsing consent on it: *Hendrickson v. Queen Ins. Co.*, 30 U. C. Q. B. 108. It is not necessary, however, to multiply cases on this subject. Where a corporation has two agents or managers of its business of equal power and authority, notice to one is constructive notice to the other, and therefore is notice to the corporation: *Perry v. Simpson Waterproof Mfg. Co.*, 37 Conn. 520.

NOTICE TO A STOCKHOLDER in a corporation respecting any corporate business, it is well settled, is not notice to the corporation, because a stockholder is in no sense an agent of the corporation: Ang. & Ames on Corp., sec. 308; 1 Dill. on Munic. Corp., 3d ed., sec. 305, note; *Housatonic Bank v. Martin*, 1 Metc. 294; *Union Canal v. Lloyd*, 4 Watts & S. 393.

NOTICE TO OFFICER OR AGENT OF MUNICIPAL CORPORATION.—In order to give effectual notice to a municipal corporation, such notice must, as in other cases of notice to agents, be communicated to an officer who has some authority and duty with respect to the subject-matter of the notice. Notice of a nuisance, for instance, on city property in Boston, if given to the mayor is notice to the corporation; but if given to the city clerk it is not sufficient;

for the mayor has authority to act in the premises, while the clerk has not: *Nichols v. City of Boston*, 98 Mass. 39. Notice to one of the supervisors of a town of a defect in a bridge under their care and superintendence is notice to the town: *Jaquish v. Town of Ithaca*, 37 Wis. 108. In an action by an attorney for compensation for his services in a suit brought on behalf of a school district, the mere knowledge of the officers and voters of the district, of the pendency of the suit, where those who receive the notice have no duty to perform in the premises, is not notice to the district: *Harrington v. Sixth School District*, 30 Vt. 155.

ELLIOTT v. POWELL.

[10 WATTS, 453.]

TRESPASSER SOWING WHEAT ON LAND CAN NOT MAINTAIN REPLEVIN against the true owner, who enters into actual possession and cuts the grain. Therefore, in replevin brought for cutting grain sown by the plaintiff on land in his possession, evidence is admissible on the part of the defendant to show that he was the real owner of the land, and as such entered into possession and took the crop, and that the plaintiff was merely a trespasser.

TITLE TO REALTY MAY BE TRIED INCIDENTALLY IN REPLEVIN or other transitory action.

ERROR to Butler county common pleas, in an action of replevin for certain wheat. The plaintiff having proved that he cleared and fenced the land, planted the wheat, and was in possession, and that the defendant entered and took away the crop, the defendant offered to show that he was the real owner of the land, and as such entered into possession and harvested the crop, and had since remained in possession, and that the plaintiff was merely a trespasser, which evidence was rejected, and the defendant excepted, and, after verdict and judgment for the plaintiff, brought error.

Gilmore, for the plaintiff in error.

Purviance, for the defendant in error.

By Court, ROGERS, J. The right of property in a chattel, which has become such by severance from the freehold, can not be determined in a transitory action. Hence it has been ruled in *Powell v. Smith*, 2 Watts, 126, that replevin would not lie for fixtures separated and removed from a mill. In that case, and in *Mather v. Trinity Church*, 3 Serg. & R. 509 [8 Am. Dec. 663]; in *Baker v. Howell*, 6 Id. 476, and in *Brown v. Caldwell*, 10 Id. 114 [13 Am. Dec. 660], it is ruled that a transitory action does not lie by one not in the actual possession of land, although he

may have a good title against one who is in the actual possession, claiming title, to determine the right to the product of the soil. The remedy is, for the reason therein clearly stated, by action of ejectment for recovery of the land itself, and by action for meane profits. The difficulty here is in the application of those principles to the facts of the case. The defendant in replevin offered to prove title to the *locus in quo*, that he entered on the premises, which was his freehold, and cut and carried away the grain, for which the replevin is brought. We are of opinion that the evidence was admissible, because, if true, it is a flat bar to the action. It would show that the *locus in quo* was his freehold, that by the entry the possession of the plaintiff was divested, and the defendant was reinstated in the possession of the premises. In *Altamas v. Campbell*, 9 Watts, 28, the chief justice, in delivering the opinion, and in this he is supported by authority, says, "an entry puts the owner for a time in the actual possession." And for this reason it was ruled that an entry on land *animo domandi* will avoid the operation of the act of limitations. By the entry of the owner claiming right, and the severance of the grain, it becomes, as a necessary consequence, his goods and chattel; the incident follows the principle as the shadow does the substance. It can not be denied that, if the plaintiff had brought trespass *quare clausum fregit*, on the plea of *liberum tenementum*, and not the general issue, the evidence would have been pertinent, because trespass can not lie for an entry on a man's own soil. Thus a tenant at sufferance can not maintain trespass against his landlord, although violently turned out of possession: *Weld v. Cohillen*,¹ 1 Johns. Cas. 123. If a person having a legal right of entry on land, enter by force, though he may be indicted for a breach of the peace, yet he is not liable to a private action of trespass for damages at the suit of the person who has no right; and is turned out of possession: *Hyatt v. Wood*, 4 Johns. 313 [4 Am. Dec. 258]. And in 13 Johns. 235,² it is ruled that where a tenant holds over the term, and the landlord enters by force and turns him out, he can not maintain trespass against the landlord. The remedy of the party aggrieved is by indictment on the statute of forcible entry, and not by a civil suit. A *tort feasor* can not have a civil suit against the owner of the freehold in any form which he may devise, whether trespass *quare clausum fregit*, *de bonis asportatis*, trover, or replevin. It will be remarked that this decision accords in all points with the cases cited. If the grain had been sowed by

¹ *Wilde v. Cantillon*.² *Jess v. Jess*.

the plaintiff, who was in the actual possession, replevin would lie, and the evidence would have been properly ruled out. But by the entry of the tenant of the freehold, he is in possession, and the owner of the grain raised on the premises. In the case of *Bruce v. Caldwell*, Caldwell was in the actual possession of the land, quarried the slate himself and for others. Bruce, who claimed the land, issued his replevin; but this the court held, under these circumstances, was not the proper remedy. It is a mistake to suppose that the title to real estate may not be incidentally tried in a transitory action. Cases may be put where the greatest injustice would result if this could not be done.

Judgment reversed, and a *venire de novo* awarded.

REPLEVIN AGAINST PARTY IN POSSESSION OF LAND FOR TREES cut or slates taken therefrom does not lie where the defendant's possession is under claim of title: *Brown v. Caldwell*, 13 Am. Dec. 660; *Snyder v. Vaux*, 21 Id. 466. Nor can a disseisee maintain replevin against his disseisor for grain sown by such disseisee, cut and removed from the land by the disseisor: *De Mott v. Hagerman*, 18 Id. 443, and note. The same rule applies in trover: *Wright v. Guier*, ante, 108, and cases cited in the note thereto. The principal case is recognized and commented on as an authority on this subject in *Harlan v. Harlan*, 15 Pa. St. 514, 515.

CASE OF PHILADELPHIA AND TRENTON R. R. Co.

[6 WHARTON, 25.]

CERTIORARI BEING A SUBSTITUTE FOR WRIT OF ERROR in those cases in which a writ of error does not lie, is governed by the same rules. Therefore no point can be raised, on *certiorari* in a road case, which is not apparent exclusively in the proceedings.

LOCATION OF RAILROAD BY A JURY instead of by the company under an act authorizing the company to locate the road, such location to be approved by the court of quarter sessions upon report of a jury after a view, is no ground of objection to the location, for the provision being for the benefit of the company it may waive it, or the jury may be regarded as its agent.

EXCEPTION DEPENDING ON LITERAL INTERPRETATION OF STATUTE authorizing the location of a railroad is not to be favored.

OBJECTION THAT JURORS WERE NOT SWORN according to the general road law, under a special statute authorizing a view and report of the location of a railroad by a jury of six, is unavailing where the statute prescribes no oath.

HIGHWAYS ARE THE PROPERTY OF THE STATE, subject to its absolute direction and control.

STREETS OF INCORPORATED TOWN ARE PUBLIC HIGHWAYS, and the regulation thereof given to the corporation for corporate purposes is subject to the paramount right of the state to provide for a more general and extended use of them.

LEGISLATURE MAY AUTHORIZE LAYING OF RAILROAD IN A STREET without providing compensation to the owner of the soil, this not being a "taking" of his property, but merely a change in the use of the public right of way over it.

"TAKING" OF PRIVATE PROPERTY FOR PUBLIC USE, within the meaning of the constitutional prohibition, refers to a taking of it altogether, and not to a mere consequential injury.

MONOPOLIES ARE NOT PROHIBITED BY THE CONSTITUTION OF PENNSYLVANIA, and the legislature may, therefore, grant exclusive privileges to a railroad.

CERTIORARI to the Philadelphia court of quarter sessions to remove the proceedings in the location of the Philadelphia and Trenton railroad on certain streets, under a special act of the legislature passed March 23, 1839. The act, in substance, authorized the company to locate and construct a railroad "from their depot in the district of Kensington to their depot at the corner of Third and Willow streets in the district of Northern Liberties by the best route along the streets between said depots, and for that purpose to occupy such street or streets as shall be most beneficial and convenient; which location, before the construction of said road, shall be approved of by the judges of the court of quarter sessions of Philadelphia, upon the view of six disinterested jurors, to be appointed by said court as directed, who, on being applied to, are hereby required to act in the premises," etc. The court appointed a jury on February 1, 1840, as required by the act, and authorized notice to be given by newspaper advertisement of the time and place of their meeting. The jury made their report on February 11, 1840, setting out their proceedings, and concluding that the jury "do hereby make the following location under the provisions of the said act." Numerous exceptions to the report were filed, which it is deemed unnecessary to set out. Depositions were taken in support of and in opposition to the exceptions, and after argument the exceptions were dismissed and the report confirmed, whereupon the proceedings were removed to this court by *certiorari* and numerous errors were assigned. Those which the court deemed material are sufficiently stated in the opinion.

Kennedy and J. R. Ingersoll, in support of the exceptions.

Mallery and Meredith, for the company.

By Court, GIBSON, C. J. A *certiorari* lies in all judicial proceedings in which a writ of error does not lie; and being a substitute for a writ of error, it is governed by the same, or strictly analogous, principles: consequently no point can be raised on it

which is not apparent exclusively in the proceedings removed by it. Though not peculiar to road cases, this principle was enforced in the case of *the Schuylkill Falls Road*, 2 Binn. 250, of *Penn's Grove and Concord Road*, 4 Yeates, 372, and of *Spring Garden Street*, 4 Rawle, 194, in all which this court refused to enter into the merits, or to decide facts on deposition. One exception alone has been made to it. In the case of *the Baltimore Turnpike*, 5 Binn. 484, evidence was heard in support of the proceedings on a point which perhaps did not need it; as all presumptions favorable to regularity may be made in consistence with the record. The exceptions in the case before us, have been framed in disregard of the general rule. In the twenty-six points raised by them, I discern few that are legitimate subjects of re-examination; and as we sit here, not to settle abstract principles, but to determine matters which lie in the course of our functions, my first business will be to cast out such of them as are not determinable here.

It is obvious that the fourth, fifth, and sixth exceptions, and also the ninth, with its eight specifications, belong to the rejected class. The supposed misleading of parties by the advertisement; the alleged misconduct of the jury in refusing to hear the owners of property and their witnesses in support of their objections and claim to damages, are matters that do not appear by the record: by reason of which, even were there substance in them, we would be compelled to dismiss them. We do not find, however, that the act by which the proceeding was directed, authorized the jury, or any one else, to assess damages; and objections to the route on the ground of policy or convenience, they were to determine, not on the testimony of witnesses, but on their own view, as was decided in *Johnson's case*, 2 Whart. 277. The judges of the quarter sessions, as they had not viewed, might indeed have satisfied themselves of the propriety of the location by the information of others; but that they were satisfied without it, is not ground of error examinable here. The ninth exception, also, with its specifications, by which is alleged that the reported route agrees not with the directions of the act, depends on facts of which we judicially know nothing; nor would they perhaps avail the exceptants if they were properly before us. We perceive not that the act requires the assent of the districts to the location; nor did it appear on the diagram exhibited at the argument that the road is not laid upon streets between the depots; and that it is not another railroad upon another route; or that it is partly on private property. It may, as

alleged, be partly on the track laid down under an agreement with the district of the Northern Liberties; but what of that? A part of that track may, notwithstanding, be on "the best route along the streets between the said depots;" and the act requires no more. As to its being laid on the track of the Northern Liberties and Penn township railroad, the interference might be made a subject of complaint by that company, but certainly by no one else; and the complaint could be heard only by the court below, no other tribunal having power to investigate the fact.

The same remarks may be applied to three specifications of the allegation contained in the tenth exception. Of contracts made by the company with the exceptants or the Northern Liberties and Penn township railroad company, we judicially know nothing; and we can not test the constitutionality of the statute by an allegation of matters which can not legitimately appear in the proceedings or in our paper books. From the copies furnished, they appear to be contracts for privileges purchased in other streets; and the law does not disturb them. If they bound the company originally, they bind it still, and the parties may still have an action for any breach of the company's engagements. None of these matters, however, are subjects of revision by us; and I turn to those which properly belong to us, premising that most of them may be dispatched in a few words.

The first exception—that the jury of view was not appointed pursuant to an authorized application by the company—seems not to be founded in fact. They were appointed on the motion of the company's solicitor; and were it not so, the manner of the appointment is a matter to which the exceptants can not make objection, since the company's ratification of the appointment by claiming under it, is equivalent to a precedent authority.

The second is, that the road was located by the jury instead of the company. In the act it is said that the company shall locate, and that the court may approve on a jury's report; but how the inhabitants could be prejudiced by allowing the act of location to be performed by the jury instead of the company's officers, has not been shown. It is not to be credited that the jury would be less disinterested and regardful of "the public business, trade, and private property" of the inhabitants, than the company itself would be. It was the privilege of the company to make the location by its officers; and in surrendering it to the jury it renounced a benefit provided for it, which a com-

mon law maxim too trite to be repeated, authorized it to do. Even were that not so, the jury might be considered as its agent, having made the location by its direction, as evidenced by its subsequent ratification of the act. The question before the court, however, regarded not the paternity of the location but the propriety of it. Not only the court, but the jury were to be satisfied of the propriety of the latter; and it is not probable that the jury would have been as well satisfied with the propriety of any other, as with their own. The exception at best depends on a literal interpretation; and it is not to be favored.

The third is, that the jury were not sworn by the authority of the court, or in the terms prescribed by the law. What terms? The act itself prescribed none: nor did it direct the jurors to be sworn at all. And yet it is stated in the report that they were sworn or affirmed according to law; and as nothing in the record contradicts it, we are to take it as it is stated. It was provided that the jury should be appointed "as directed"—and here the sentence was left incomplete by the omission of something intended to have been subjoined; but what that was, can not be conjectured. In the case of *Adelphi Street*, 2 Whart. 176, a proceeding to vacate a street, was held to be within the purview of a preceding section to vacate a particular alley, which was directed to be in the usual manner; and this on the ground that there were general principles of practice in laying out and vacating streets, to which the legislature must have referred. That practice, however, has no relation to the proceeding before us, which is *sui generis*. That it was not intended to be regulated by the road law, is clear, from the fact that no petition for a view was required; nor was there to be an order to view, because the jury were to act on being applied to, and consequently without a particular mandate. As then no oath was prescribed, it is not necessary that the jurors should have been sworn at all; and this disposes also of the eighth exception, that the court had not allowed, in conformity to the general road law, two full terms betwixt the appointment of the jury and the confirmation of their report.

The remaining exception is more important, because it calls in question, for specific reasons, the validity of the statute which is the foundation of the proceeding, and which is said to be unconstitutional because it impairs the obligation of contracts; by violating the chartered rights of the districts of Spring Garden and the Northern Liberties; by violating the

contract under which the right of passage is assured to the inhabitants of this particular street; by taking the property of the street without compensation to the districts or individual proprietors; and by monopolizing the street in derogation of the public and private uses to which it had been applied. This, perhaps, is the substance of all these multifarious specifications.

What is the dominion of the public over such a street? In England, a highway is the property of the king as *parens patriæ*, or universal trustee; in Pennsylvania, it is the property of the people, not of a particular district, but of the whole state; who, constituting as they do the legitimate sovereign, may dispose of it by their representatives, and at their pleasure. Highways, therefore, being universally the property of the state, are subject to its absolute direction and control. An exclusive right of ferriage across a navigable stream, which is a public highway, is grantable only by it; and the navigation of the stream may be impeded or broken up by it at its pleasure. In the construction of her system of improvements, Pennsylvania has acted on this principle. Her dams across her principal rivers to feed her canals, have injured if they have not destroyed the descending navigation by the natural channels; and this without a suspicion of want of constitutional power. The right of passage by land or by water, is a franchise which she holds in trust for all her citizens, but over which she holds despotic sway, the remedy for an abuse of it being a change of rulers and a consequent change of the law. No person, natural or corporate, has an exclusive interest in the trust, unless she has granted it to him. Her right extends even to the soil, being an equivalent for the six per cent. thrown into every public grant as compensation for what may be reclaimed for roads; and she has acted on the basis of it; for though damages for special injuries to improvements have been allowed by the general road laws, nothing has been given for the use of the ground. This principle was broadly asserted in *The Commonwealth v. Fisher*, 1 Penn. 466.

Such being a highway as a subject of legislative authority, in what respect is a street in an incorporated town to be distinguished from it? A municipal corporation is a separate community; and hence a notion that it stands in relation to its streets as the state stands in relation to the highways of its territory. That would make it sovereign within its precincts—a consequence not to be pretended. The owner of a town plot lays out his streets as he sees fit, or the owner of ground in an

incorporated town, dedicates it to public use as a street; but it follows not that the dominion of the state is not instantly attached to it. The general road law extends to every incorporated town from which it is not excluded by provision of the charter; and the statute book is full of special acts for opening, widening, altering, or vacating streets and alleys in Philadelphia and our other cities. Were it not for the universality of the public sovereignty, the public lines of communication, by railroads and canals, might be out by the authority of every petty borough through which they pass; a doctrine to which Pennsylvania can not submit, and which it would be dangerous to urge. It would be strange, therefore, were the streets of an incorporated town, not public highways, subject perhaps to corporate regulation for purposes of grading, curbing, and paving; but subject also to the paramount authority of the legislature in the regulation of their use by carriages, rail cars, or means of locomotion yet to be invented, and this without distinction between the inhabitants and their fellow-citizens elsewhere. The doctrine was carried to its extent in *Rung v. Shoneberger*, 2 Watts, 23 [26 Am. Dec. 95], in which it was affirmed that, though a city has a qualified property in its public squares, it holds them as a trustee for the public for whose use the ground was originally left open; and that the enjoyment of them is equally free to all the inhabitants of the commonwealth, subject to regulations not inconsistent with the grant. In *Barter v. The Commonwealth*, 3 Penn. 259, it was inadvertently said that the title to the soil of a street is in the corporation, whose right to improve it for purposes which conduce to the public enjoyment of it, is exclusive and paramount to the right of an inhabitant. The point was only incidentally involved, and consequently not very particularly considered; but the question of title, involving as it has done, no more than the bounds of the grant, has lain between the grantor and the grantee, or those deriving title from them. In no case has title been claimed by the corporation.

In the *Union Burial Ground Company v. Robinson*, 5 Whart. 18, in which the point was elaborately argued, the contest was betwixt the grantor and a purchaser from the grantee; and though the cause was eventually decided on another ground, the court inclined to think, on the authority of many decisions, that the title to the street, even if it had been opened, would have remained in the grantor; and such appears to be the principle of *Kirkham v. Sharp*, 1 Id. 323 [29 Am. Dec. 57]. The legal

title to the ground, therefore, remains in him who owned it before the street was laid out; but even that is an immaterial consideration; for an adverse right of soil could not impair the public right of way over it, or prevent the legislature from modifying, abridging, or enlarging its use, whether the title were in the corporation or a stranger. I take it then that the regulation of a street is given to a corporation only for corporate purposes, and subject to the paramount authority of the state in respect to its general and more extended uses; and that there would have been no invasion of chartered rights in this instance, even did either of these districts stand in a relation to the public, which would impart to its charter the qualities of a compact.

What then is the interest of an individual inhabitant as a subject of compensation under the constitutional injunction that private property be not taken by a corporation for public use without it? Even agreeing that his ground extends to the middle of the street, the public have a right of way over it. Neither the part used for the street, nor the part occupied by himself, is taken away from him; and as it was dedicated to public use without restriction, he is not within the benefit of the constitutional prohibition, which extends not to matters of mere annoyance. The injury of which he can complain, is not direct but consequential. It consists either in an obstruction of his right of passage, which is personal; or in a depreciation of his property by decreasing the enjoyment of it: but no part of it is taken from him and acquired by the company. The prohibition, even when it precluded a seizure of private property immediately by the state, was not largely interpreted, nor was there reason that it should be, as ample compensation was obtained from her sense of justice without it. The sufferers were overpaid, and this sort of aggression was always courted as a favor. But though she usually compensated consequential damage, it was of favor, not of right. Nor did she always make such compensation. In one well-known instance, she destroyed a ferry by cutting off access to the shore, without provision for the sufferer; and in the *Commonwealth v. Richter*,¹ 1 Penn. 467, damages were unavailingly claimed from her for flooding a spring by a dam. The clause in the amended constitution which narrows the former prohibition to a taking of private property for a public use by a corporation, is to receive the same construction; the word "taking" being interpreted to mean, taking the property altogether; not a consequential injury to it which is no taking

1. *Commonwealth v. Fisher*.

at all. For compensation of the latter, the citizen must depend on the forecast and justice of the legislature.

On the subject of the next specification, it seems scarcely necessary to say that monopolies are not prohibited by the constitution; and that to abolish them would destroy many of our most useful institutions. Every grant of privilege so far as it goes, is exclusive; and every exclusive privilege is a monopoly. Not only is every railroad, turnpike, or canal such, but every bank, college, hospital, asylum, or church, is a monopoly; and the ten thousand beneficial societies incorporated by the executive on the certificates of their legality, by the attorney-general and judges of the supreme court, are all monopolies. Nor does it seem more necessary to remark, on the subject of the concluding specifications, of exception to the confirmation of the report by the associate judges of the sessions alone, that the approval was an act of the court; and that they were competent to hold it.

Proceedings affirmed.

CERTIORARI, WHAT MAY BE REVIEWED ON: See the note to *Duggen v. McGruder*, 12 Am. Dec. 532.

STREETS, POWER OF MUNICIPAL CORPORATION OVER: See *Humes v. Mayor of Knoxville*, 34 Am. Dec. 657, and cases cited in note. That streets and other public highways are subject to the paramount control of the state, is a point to which the principal case is cited in *Southwark R. R. Co. v. Philadelphia*, 47 Pa. St. 321.

COMPENSATION FOR LAND TAKEN UNDER POWER OF EMINENT DOMAIN: See the note to *Bloodgood v. Mohawk etc. R. R. Co.*, 31 Am. Dec. 372. See also *Thompson v. Grand Gulf R. & B. Co.*, 34 Id. 81. As to the appropriation of property for laying out a railroad, see *Whiteman's Ex'x v. Wilmington etc. R. R. Co.*, 33 Id. 410, and cases cited in the note thereto. The owner of a limited interest in property taken by eminent domain is entitled to compensation to the extent of his interest: See *Ex parte Jennings*, 16 Id. 447. "Taking" of private property for public purposes, within the constitutional prohibition, means the absolute appropriation of it: *Monongahela Navigation Co. v. Coons*, 6 Watts & S. 113; *Watson v. Pittsburgh etc. R. R. Co.*, 37 Pa. St. 479. A property owner is therefore not entitled to compensation for merely consequential injury from the making of a public improvement: *O'Connor v. Pittsburgh*, 18 Pa. St. 189; *Sunbury etc. R. R. Co. v. Hummell*, 27 Id. 104; *Branson v. Philadelphia*, 47 Id. 332; *Delaware etc. Canal Co. v. McKeen*, 52 Id. 125, all citing the principal case.

POWER TO AUTHORIZE LAYING OF RAILROAD IN PUBLIC STREET: See *Leaington etc. R. R. Co. v. Applegate*, 33 Am. Dec. 497, and note. To the point that the legislature has power to authorize the laying of a railroad in the streets of a city without providing for compensation to the corporation or to the owners of the soil, the principal case is cited in *Henry v. Pittsburgh etc. Co.*, 8 Watts & S. 87; *Mercer v. Pittsburgh etc. R. R. Co.*, 36 Pa. St. 104; *Commonwealth v. Erie etc. R. R. Co.*, 27 Id. 354; *Snyder v. Pennsylvania R. R. Co.*, 55 Id. 344; *Cleveland etc. R. R. Co. v. Speer*, 56 Id. 332.

RAILROAD DEEMED A PUBLIC HIGHWAY: See the note to *Beckman v. Saratoga etc. R. R. Co.*, 22 Am. Dec. 695. See also *Lexington etc. R. R. Co. v. Applegate*, 33 Id. 497, and cases cited in the note thereto. See also *Rathbone v. Tioga Navigation Co.*, 2 Watts & S. 79, citing the principal case.

CHURCHMAN v. SMITH.

[6 WHEATON, 146.]

BOOK OF ENTRIES MANIFESTLY ERASED AND ALTERED in a material point, unless explained so as to do away with the presumptions against it existing on its face, should not be admitted in evidence.

ENTRIES MADE BY CLERK AND CARTER, WHO DELIVERS GOODS, from his memoranda immediately upon his return from making such delivery, are original entries.

ABSENCE OF INSTRUCTIONS NOT SPECIFICALLY PRAYED for is not error.

ERROR to Delaware county common pleas in an action of *assumpsit* brought against the defendants as partners. Pleas, *non assumpsit*, payment, etc. The principal question was as to the admissibility of a certain book of original entries offered in evidence by the plaintiff, and admitted against the objections of the defendants, who thereupon excepted. Exception was also taken to the charge of the court; but as the objections thereto are not particularly noticed by the supreme court, we deem it unnecessary to set them out. For the same reason the numerous errors assigned by the defendants, after verdict and judgment against them, are also omitted.

Reed and Dallas, for the plaintiffs in error.

Sterigere and Edwards, for the defendant in error.

By Court, SERGEANT, J. The errors in this case have been needlessly multiplied and subdivided into a great variety of heads, calculated rather to confuse and perplex the case than to aid the investigation of it. On the argument here they have been very properly reduced to a few points, which embrace all that is material. Books of entry, supported by the oath of the plaintiff himself, are a peculiar species of evidence, not now admitted by the English law, but introduced into usage in this country at an early period, either from the necessity of the case, as we find it stated in our books, or in analogy to the civil law, by which a man's own books of account, with the suppletory oath of the merchant, amount to full proof. The provisions of the civil law on this subject are explained in 3 Bl. Com. 368 and

370; and the statute 7 Jac. I., c. 12, in its preamble and enactments, shows that at one time in England, books of entries were evidence at common law. This statute confines this species of proof to transactions that have happened within one year before action brought, unless between merchant and tradesman in the usual intercourse of trade. It was decided by Holt, C. J., notwithstanding this statute, that a shop-book was not evidence of itself within the year: *Pitman v. Maddox*, Salk. 690. But whatever may be the origin of the practice here, it has become firmly fixed and settled, as a general rule, that books of entries are evidence to prove goods sold and delivered, or work done. It has, however, always been kept by the courts within prescribed bounds, and various modifications and restrictions imposed, to guard against the abuses which the *ex parte* acts of a person interested might otherwise lead to. Of these the courts have themselves been the judges before they would permit the book to go to a jury, and they have considered it as a species of evidence which ought not to be extended beyond its ancient limits, and that a strict hand is to be kept over it: *Thompson v. McKelvy*, 13 Serg. & R. 127. In that case, scraps of paper, containing some scribbling or figuring on them, besides the account of sales of the goods, were rejected. So, where they are not made at or near the time of the transaction, they are inadmissible: *Curren v. Crawford*, 4 Id. 5. They are not admissible to show a collateral fact: *Juniata Bank v. Brown*, 5 Id. 226. These and various other regulations have, from time to time, as the points occurred, been adjudged as necessary to keep this sort of evidence within reasonable bounds.

In the case before us, the plaintiff's book of entries has been shown to us on the argument here, and it is obvious that there has been an erasure and alteration of the account against the defendants, and that in a material part; and it is left upon the evidence wholly without explanation. The heading of the account, "Roberts & Co. Dr.," seems clearly to have been written upon an erasure of some prior heading; and in another entry in the account of May 23, 1833, the same thing occurs. The heading of the account is in this case very material; it concerns, indeed, the main point in issue, whether the defendants were in partnership. A book of entries, manifestly erased and altered in a material point, can not be considered as entitled to go to the jury as a book of original entries, and ought to be rejected by the court, unless the plaintiff gives an explanation, which

does away with the presumption which must exist on its face. To allow such a book to go to a jury would subject this sort of evidence to the danger of great abuse, and tempt dishonest men to commit frauds by altering books, so as to adapt them to circumstances; whereas such book should be a faithful record of transactions as they occur, and be pure and free from suspicion on its face; or if altered, some explanation should be required. There may be cases, undoubtedly, where the rule may operate severely; but, on the other hand, it is one which the safety of the community seems to us to require, and one which is necessary to keep this species of evidence within its proper and accustomed limits. The other objections to the book do not seem to be supported by the evidence given. The only entries in the book relating to claims for which receipts were given by the carters, are proved by the plaintiff to have been the two which the court excepted. The other entries may consequently have been made from memoranda, by Reid, the clerk; who also acted as carter; and if after delivering the powder himself, he made entries in the book from his memoranda, the book would be evidence. It would also seem inferable from the evidence that these entries were made by Reid on his return home, which would be in season. This disposes of the first and second errors.

The third error is improperly assigned, there being no bill of exceptions. The ninth, eleventh, and twelfth errors are to the charge of the court, and we think they are not sustained. It is hardly possible for any court to charge in such language as to comprehend every possible point of view in which the case might be put, or to notice every exception to the general rules of the law. If the party wishes an explicit answer in relation to any particular point, it ought to be brought to the view of the court directly.

Judgment reversed, and a *venire facias de novo* awarded.

BOOKS OF ENTRY AS EVIDENCE: See the note to *Union Bank v. Knapp*, 15 Am. Dec. 191; see also *Merrill v. Ithaca etc. R. R. Co.*, 30 Id. 130, and *Sickles v. Mather*, 31 Id. 521, and other cases in this series cited in the notes thereto. That erasures and interlineations unexplained will render a book of entries inadmissible as evidence, is a point to which *Churchman v. Smith* is cited in *Hudson v. Reel*, 5 Pa. St. 282, and *Funk v. Ely*, 45 Id. 448.

ABSENCE OF INSTRUCTIONS NOT ASKED is not error: *Burns v. Sutherland*, 7 Pa. St. 108; *Cattison v. Cattison*, 22 Id. 277, both citing the principal case.

EDGEELL v. McLAUGHLIN.

[6 WHARTON, 176.]

MONEY WON UPON A WAGER IS NOT RECOVERABLE in Pennsylvania. Therefore, an action upon a check shown to have been given in pursuance of a bet, can not be maintained.

ERROR to the Philadelphia district court in an action upon a check drawn by the defendant upon the Philadelphia bank in favor of one Comfort or bearer. Plea, *non assumpsit*, etc. The check was proved, and also the refusal of the bank to pay it, by direction of the defendant. The defendant was permitted to prove, against the plaintiff's objection, that the check was put into Comfort's hands in pursuance of a wager between the plaintiff and defendant, as to whether or not the defendant had written a certain letter, the plaintiff having also deposited his check for the same amount. The plaintiff proved the writing of the letter mentioned in the wager. The court charged the jury that this was an "idle and trifling wager," and directed a verdict for the defendant. Verdict accordingly, and judgment thereon, which the plaintiff now sought to reverse, alleging error in the admission of the evidence offered by the defendant and in the charge of the court.

Kennedy and St. Geo. T. Campbell, for the plaintiff in error.

McLaughlin, for the defendant in error.

By Court, **SERGEANT, J.** Courts of justice are instituted to determine the disputes among men, necessarily arising from their existence together in society. The time and labor of a large class of its citizens are devoted to the adjustment of these disputes at a great expense to the community; and this class is as necessary to the welfare of society as the existence of any of the occupations in which men do for others what they can not do for themselves. But in the innumerable contentions that human affairs originate, there is sufficient to engross the time and labor of its tribunals, without occupying them in the investigation of gratuitous contests, such as wagers; which flow sometimes from a spirit of gambling, sometimes from heat of passion, and sometimes from folly and indiscretion on the one side, and stratagem and cunning on the other. Hence the more intelligent judges of modern times have revolted at examples of this sort of suit, which have been sustained in a court of justice; such as that in 5 Burr. 2802,¹ of two sons wagering on the lives of their fathers;

1. *Earl of March v. Pigot*.

and other judges have undertaken to refuse to try such suits, on the ground that the wager was impertinent or frivolous, and have turned the plaintiffs out of court. In many other instances, nice and ingenious distinctions have been sought to get round the general principle, and to defeat the plaintiff's recovery, till the exceptions are now so many that it requires some effort of mind to fancy a wager which might be free from the exceptions to the rule, considering the strong feeling which leads modern courts to struggle against this sort of action: See Selw. N. P. 1086, chapter on Wagers.

Fortunately, however, for us in Pennsylvania, there is no decision in its highest tribunals, that a wager is recoverable; and the only authority that exists on the subject is expressly in point to the contrary. In *Pritchett v. Ins. Co. N. America*, 3 Yeates, 458, it was held, in the year 1803, that a policy of insurance in which the insured had no interest, was a wagering policy, and as such was void. It was at the same time admitted, that the stat. 19 Geo. II., prohibiting these policies in England, did not extend to this state; nor could it by the settled rules as to the construction of English statutes enacted prior to the revolution. On no other ground could the case have been so held than the common law of Pennsylvania, by which wagers were considered contrary to its genius and policy, and not recoverable by action in a court of law. "Every species of gaming contracts," says Mr. Justice Yeates, delivering the opinion of the court, "wherein the insured having no interest, or a colorable one merely, or having a small interest much overvalued, in a policy, under the cloak of insurances, is reprobated by our law and usage."

The next case and the only other in which the point was contested in this court, is the case of *Phillips v. Ives*, 1 Rawle, 458,¹ in which the defendant bet that within two years Napoleon Bonaparte would escape or be removed from the island of St. Helena; and if he died within the two years, the defendant would lose the bet. Napoleon died within the two years. Yet it was decided by a majority of this court, that the bet was not recoverable, it being held that no bet of any kind about any human being, is recoverable in a court of justice. This case certainly went a great way towards recognizing the doctrine, that no bet or wager could be recovered; but it was not necessary then to go so far. Mr. Justice Huston, however, expresses his opinion very plainly, that though bets were recoverable by the common law of En-

1. 1 Rawle, 36.

gland, it was not a part of the common law introduced into Pennsylvania by William Penn or his successors, nor recognized in the act of assembly passed in 1777, which is our guide on that subject. And I fully concur with him, that it is not. When I look back to the character and principles which actuated our founders and predecessors, I am satisfied they never countenanced such a principle, but left parties who chose to embark into contracts of this kind, to recover as they could, according to the code of honor under which they originated; and that it is derogatory to the character and injurious to the interests of the community, to sanction them, and to employ their legal tribunals in investigations, often indecent, often inflammatory, often impertinent and frivolous, and always useless, if not noxious in their effects on society.

Where a wager is but a fiction of law, invented for the trial of a right, it has nothing in common with a wager in which there is no right in question between the parties. Of course, the above remarks do not apply to the form often adopted under a feigned issue, as the most convenient mode of settling precisely the fact averred on one side and denied on the other.

We concur, therefore, with the court below, that this action can not be sustained.

Judgment affirmed.

WAGERS, VALIDITY OF: See *Rust v. Gott*, 18 Am. Dec. 497; *Stoddard v. Martin*, 19 Id. 643; *Holt v. Hodge*, 25 Id. 451, and *State v. Smith*, 33 Id. 132, and other cases in this series cited in the notes thereto. The principal case was approved and followed in *Brua's Appeal*, 55 Pa. St. 297. So in *Love v. Harvey*, 114 Mass. 82, it is cited to the point, that all wagers are illegal. In *Scott v. Duffy*, 14 Id. 19, it is said, however, that the case only settles the law for wagers in Pennsylvania, and does not prevent the recovery in that state of money lent in another state to bet upon an election.

DEPEAU v. WADDINGTON.

[6 WHARTON, 220.]

HOLDER OF NOTE PLEDGED AS COLLATERAL SECURITY for a pre-existing debt, is not deemed a *bona fide* purchaser for value, who will be protected against equities between the original parties to such note, unless there be proof of some new and distinct consideration, such as giving time on the pre-existing debt, or the like.

EXCHANGE OF COLLATERAL SECURITIES IS SUFFICIENT CONSIDERATION to constitute the holder of a note pledged as security for a pre-existing debt a *bona fide* purchaser for value, as where, in consideration of receiving such note as security, the creditor surrenders his right to the proceeds of a

bond for a larger amount previously pledged as security for the same debt, which he has delivered to the debtor for the purpose of enabling him to obtain payment of it.

DELAY OF MAKER OF NOTE PLEDGED AS COLLATERAL SECURITY in giving notice to the pledgee, after knowledge of such pledge, that no consideration was given for the note, is a circumstance to be considered by the jury in determining his liability.

ERROR to the Philadelphia district court, in an action of *assumpsit* brought by the plaintiffs, partners under the firm name of Ogden, Waddington & Co., against the defendant as maker of a note made by him in favor of Robinson and Smith and indorsed to the plaintiffs. The facts are sufficiently stated in the opinion. The substance of the charge to the jury, so far as excepted to, also appears from the opinion, as well as the material errors assigned by the defendant, verdict and judgment having been rendered against him, which he now sought to reverse.

Norris and Haly, for the plaintiff in error.

Biddle and Cackvalader, for the defendants in error.

By Court, ROGERS, J. This was an action of *assumpsit* on a promissory note, drawn by the defendant Depeau, in favor of Robinson & Smith, or order, and by them indorsed to the plaintiffs. The plaintiffs lent Robinson & Smith fifteen hundred dollars on a note; and as a collateral security, the latter firm placed in the hands of the former a bond for twenty-three or twenty-four hundred dollars, of a certain Edward Miller to Thomas S. Smith, one of the partners of Robinson & Smith. Some time after, Robinson called on the plaintiffs, and stated that he wanted to take the bond away, and to get it discounted. Robinson & Smith, a week or so after the delivery of the bond, paid to Ogden & Co. eight hundred dollars, and transferred the note in suit to them as collateral security for the amount yet remaining due. The plaintiffs gave up their claim upon the bond for the note and the eight hundred dollars. It seems that the note of Robinson & Smith to the plaintiffs was protested; that one of that firm came to the plaintiffs, and stated that they would lend him the bond for a day, he had an opportunity of getting the money upon it, and would then pay the fifteen hundred dollars. The bond was delivered to him for that purpose; but the bond was neither redelivered to the plaintiffs, nor was the amount due on the note paid according to the understanding between them; but some time afterwards—how soon is not recollected, nor is it

material—eight hundred dollars in cash were paid, and the note in suit was transferred to the plaintiffs, in lieu of the bond, and as a collateral security for the note. It may be inferred from the evidence, although no direct proof is given of it, that the bond was assigned for a valuable consideration, or paid by the obligor: that the money was received by Smith, one of the obligees; and that eight hundred dollars were paid of the proceeds. Robinson, of the house of Robinson & Smith, says, that the bond was delivered to the deponent's firm on payment of part of the fifteen hundred dollars, upon the understanding that the deponents would immediately pay them the balance of the amount due; that the object of the firm in getting the bond was to have it discounted, and pay the plaintiffs at once; the bond being for a considerably larger sum than was due. He does not recollect whether the plaintiffs afterwards asked his firm for other security, although they may have done so. He thinks the note in suit was, a few days after the bond was delivered up by the plaintiffs, proffered to them, as collateral security for the balance due. They handed over the note about a week after the bond was delivered up, but after they had secured the bond; that is, as I understand it, after they had received the money for it. No other, or new consideration was given by the plaintiffs for the note. The understanding was, that the deponent's firm was to pay the plaintiffs immediately the balance due them; that the bond was to be discounted at once for that purpose. Nothing was stipulated about the security, because the balance was to be immediately paid in cash. The note in suit was given for the purpose of being discounted for the sole accommodation of Depeau.

The defendant alleges that there was no consideration for the note in suit; that the transfer of it to the plaintiffs was in fraud of his rights; that it was placed in the hands of the plaintiffs as collateral security, and that consequently there is the same equity existing as between the maker and payee. The plaintiffs admit that there was no consideration between the original parties; that the payee could not recover, and that if pledged as a collateral security, without more, for a pre-existing debt, they would be in no better situation than the first holder; but they contend that there was an exchange of securities in substitution of the note for the bond, or the proceeds of the bond, and that they were innocent holders for value.

Several exceptions have been taken to the charge of the court, none of which have been sustained. The charge is clear and

precise, and substantially answers all the points which were made, and is as favorable to the defendants as he had any right to expect. The court leave the facts to the jury, and if there be any error, it is the application of the evidence to the points ruled. In the investigation of the case it becomes material to ascertain what are the facts found by the jury, and to which their attention was directed by the court. They are in substance, these: That placing the bond in the hands of Robinson & Smith, who acted as the agents of the plaintiffs, was for a particular and special purpose, viz., that they would immediately dispose of the bond; which they did; and that they would pay over a portion of the money to them; and that in the mean while, the proceeds would be held by them as a pledge or security for the amount due on the note; that the money raised by the sale or payment of the bond was a substitute for the bond; that as the bond was a collateral security, so was the money arising therefrom. That at the time they stood in the relation of principal and agent, the parties came to an arrangement, and in consideration that the plaintiffs would relinquish all claim to the money, whether lien or otherwise, they agreed to transfer, in lieu of the bond or the proceeds thereof (which the jury have found to be the same thing), the note now in suit as a collateral security for the original debt. The only question, therefore, is, are the plaintiffs innocent holders for value. As between the maker and payee, it is granted, there was no consideration, and the failure and absence of this would be a good defense to the maker. But between other parties, as here between the plaintiffs and defendant, two distinct considerations come in question; first, that which the defendant received for his liability; and secondly, that which the plaintiffs gave for their title. If the defendant can show that he has an equity not to be charged, as if he can prove, as has been done here, that he received no consideration for his liability, or that his signature was obtained by force or fraud, he may, after giving due notice, require the plaintiff to show that he gave a valuable consideration for the note or bill, and that the plaintiff has no equity to recover. But actions between remote parties will not fail unless in case of absence or failure of both these considerations. It is conceded here, that as between the maker and payee, there is no consideration whatever; that the plaintiffs are required to prove that they gave a valuable consideration for the note, and that if the note is held merely as a collateral security for a pre-existing debt, without more, it is not such a consideration as will pre-

vent the defendant from availing himself of the equity as between the maker and payee.

In *Rosa v. Brotherson*, 10 Wend. 85, it is decided, that when the creditor receives the transfer of a negotiable note, in payment of a pre-existing debt, he takes it, although transferred to him before maturity, subject to all existing equities between the original parties. But that case was not well considered, and has been subsequently overruled. But although this is so, it has been repeatedly held that a collateral security for a pre-existing debt, without more, is not such a consideration as will give title to the holder; yet, if there is a new and distinct consideration, the holder is a purchaser for value, and, as such, protected from a defense which would have been available between the original parties. It seems to me there would be no great difficulty in proving that it would have been better not to have restrained the negotiability of paper *bona fide* pledged as a collateral security for a debt; but on this point, the law is settled. Without making a parade of learning and research by the citation of numerous authorities, foreign and domestic, ancient and modern, it is sufficient to refer to *Petrie v. Clark*, 11 Serg. & R. 377 [14 Am. Dec. 636], where both points are ruled. It is there held that the transfer of negotiable paper as collateral security for a pre-existing debt, does not constitute a person a holder for a valuable consideration. But where there is a new consideration, as where it can be shown that time was given in consideration of obtaining the note as a security for the debt, it would be otherwise. The court, after stating the general principle adverted to, add, that it might be shown on the other side that the plaintiffs had a right to recover, provided they were able to prove that time was given in consideration of obtaining the note as security for the debt, and that in consequence the debt was lost. The giving of time would be a present and a valuable consideration; and a pledge in these terms would be the same as a pledge for money paid down. Here the principle is plainly announced; for the case put is but an illustration of the principle, and applies with great force to the case in hand. Where the holder of a note or bill has not paid value for it, he is in privity with the first holder, and will be affected by anything that would affect the first holder: *Collins v. Martin*, 1 Bos. & Pul. 651. But no evidence of want of consideration, or other ground, to impeach the apparent value received, was ever admitted in a case between an acceptor, a drawer, or maker, and the person holding the bill or note for value. There is no

evidence that the plaintiffs were aware of the nature of the transaction between the maker and payee. There was a pre-existing debt between the plaintiffs and the payee, for which they had a collateral security amply sufficient for their entire indemnity. One of the firm obtains possession of the bond for the particular purpose of reducing it into cash, and with the proceeds paying the amount due on the note. The money was raised by them, and instead of paying it over, as was the understanding, and their duty, in lieu thereof they assign to them the note now in suit.

Now, in what situation did Robinson and Smith, at the time of the transfer, stand to the plaintiffs? Clearly in the light of agents, with the money of the principals in their hands, recoverable by action of assumpsit for money had and received, and which might have been followed by them into any specific property into which they may have converted it. As for instance, if they had purchased stock, it would have been subject to their claim: 3 Mau. & Sel. 562. The proceeds of the bond, to the amount of the lien, were theirs, and there is no evidence—but the reverse may be inferred—that the parties intended to convert the transaction into a mere personal contract between them. And if this had been the effect, it is far from clear, that if the right to a special action in the case had been relinquished, it would not have been a valuable consideration. The consideration is everything—the amount of it nothing, unless it is a colorable consideration. But be this as it may, the plaintiffs are holders for value. For what is this but an exchange of securities? and this, if it needed authority, has been ruled to be a sufficient consideration, in *Hornblower v. Proud*, 1 Barn & Ald. 333.¹ But it is said, it is the exchange of one collateral security for another collateral security—and this is true; but may not the former have been of more value than the latter, as it undoubtedly was here, although that is an immaterial circumstance, so far as the legal point is involved. It is very plain, that had the plaintiffs retained their original security, they would have had no difficulty whatever. It has been produced solely by the exchange of securities. The same general rules which apply to the nature of the consideration for other simple contracts are applicable here. If a man give his acceptance to another, that will be a good consideration for a promise on another bill, though such acceptance is unpaid. And cross-acceptances for mutual accommodation are respectively considerations for each other: *Rose v. Sims*, 1 Barn. & Adol. 521; *Cowles v. Dunlop*, 7 T.

1. 2 Barn. & Ald. 327.

R. 565; *Buckler v. Buttivant*, 3 East, 72. In *Bosanquet v. Dudman* (1 Stark. 1), it was held, that when a banker's acceptances for his customer exceeded the cash balance in his hands, and accommodation acceptances were deposited by the customer with the banker, as collateral security, whenever the acceptances exceeded the cash balance, the banker held the collateral bills for value. The reason that a negotiable note transferred as a collateral, does not constitute the holder a purchaser for value, is, that he is supposed, although very often contrary to the fact, to be in no worse situation than he was before. But that is not the case where there is a new and distinct consideration superinduced by the transfer and exchange of securities. It is not a past, but a present consideration.

The plaintiffs in error contend, that the judge erred, 1. In charging the jury that a parting with the possession of the bond, for the purpose of a sale of it, was no surrender of the property in it; and that the parting with the possession did not imply that the plaintiffs gave up their claim to it. Coupled with the evidence, we see no error in the charge; as it was the understanding of the parties, and the jury have so found, that it should be used for the special purpose of converting the bond into money, and paying the plaintiffs' debt. *Quoad* this amount they were the agents of the plaintiffs.

2. In charging that if the defendant slept upon the knowledge that the plaintiffs held the note, and did not immediately give them notice that no value had been received for it, it was a circumstance for the consideration of the jury, in reference to his liability. The answer refers to the plaintiffs' ninth point; and it may be doubtful whether, if there be error at all, it is not against the plaintiffs. It is conceded, that the plaintiffs were not aware of the want of consideration between the original parties; at least there is no proof of it: that they were resting under the conviction that there was no want of faith between them: that there was, at least, a moral obligation on the defendant, as soon as he was informed of the true state of the case, to take the earliest opportunity to apprise them of it, that they might secure themselves; but instead of this, he seems to rely on the promise of Robinson & Smith, to indemnify him by payment of the plaintiffs' debt. There is nothing to complain of in this part of the charge, as it certainly was a circumstance which the jury might take into consideration.

But it is said that there is error, because the judge did not answer the defendant's points at all: and that he misdirected the

jury as to the law arising from the evidence. That the latter allegation is groundless, I have endeavored to show; and as to the former, all the points to which the defendant was entitled to an affirmative answer, are noticed in the charge. But in addition, this case is in some respects peculiar; and we sincerely hope it will be the last of its kind. When the judge was about to deliver his charge to the jury, the defendant's counsel handed to him a paper containing five points to be charged on. The judge supposed that the general charge had covered all the ground taken in the argument; and from the opportunity afforded of examining the points, he was not aware that anything in them had not been sufficiently noticed. He desired, however, if the counsel for the defendant wished any more specific answer, that a designation would be made of the portions of the points which had not been embraced in the remarks already submitted to the jury.

The counsel for the defendants then referred to the fourth and fifth points. To this he answered, that no difference had been shown between the law of New York and the law of Pennsylvania; and therefore the point did not arise. In this the court was right; for no difference now exists in the law of the two states in this particular. The courts of New York have retraced their steps; and the law is the same there as here.

As to the fourth point, the judge said, that it appeared to be complicated of law and fact; and believing it to be answered by the general charge, so far as the defendant was entitled to have it answered, he had no further reply to give to it. The remarks already made show that the point was substantially answered; but there is another reason equally conclusive. After stating his impression, that the point (certainly not so clearly expressed as to be understood in a minute) had been answered, the judge requested the counsel for the defendant to specify as to what particular the fourth point had not been answered; and the counsel not presenting any such specification, no further response was made by the court. To convict a judge of error, after evincing his desire in this manner to do justice to the parties, might lead to the practice of trick and artifice and concealment, and must be specially avoided; or otherwise the trial by jury would be a common nuisance. It is not intended to intimate that there was not due fidelity to the court in this case; but we must presume that the counsel knew in what particular the judge failed or omitted to answer; and in common candor it was their duty, being appealed to, to point it out. If they choose not

to do so, for motives best known to themselves, it is an error arising, in part at least, from their own omission; and can not be a ground for reversal. If any injury arises from it, it is a matter to be settled between the counsel and the client.

As to the question of the onus, which has been so much discussed in the argument, it was a proper subject of remark before the jury; and is only material here, as bearing upon the facts found by the jury.

Judgment affirmed.

BONA FIDE HOLDER, WHO IS.—See the note to *Bay v. Coddington*, 9 Am. Dec. 272. See, also, *Coddington v. Bay*, 11 Id. 342; *Proctor v. McCall*, 23 Id. 135; *Sims v. Lyle*, 26 Id. 155, and note; *Beltzhoover*, 27 Id. 330; *Vairin v. Hobson*, 28 Id. 125, and note; *Brush v. Scribner*, 29 Id. 303, and note; *Bank of St. Albans v. Gilliland*, 35 Id. 566. It is settled law in Pennsylvania that one who takes a negotiable note as collateral security for a pre-existing debt without any new or distinct consideration, is not a *bona fide* holder for value: *Kirkpatrick v. Muirhead*, 16 Pa. St. 123; *Lord v. Ocean Bank*, 20 Id. 386; *Garrard v. Pittsburgh etc. R. R. Co.*, 29 Id. 160; *Bayler v. Commonwealth*, 40 Id. 44; *Taylor's Appeal*, 45 Id. 83; *Lenheim v. Wilmarling*, 55 Id. 76, all citing the principal case. It is cited and distinguished also in *Appleton v. Donaldson*, 3 Id. 387.

BAKER v. HAINES.

[6 WHARTON, 294.]

UNAIDED COMPARISON OF HANDS IS GENERALLY INADMISSIBLE in Pennsylvania, but such evidence is admissible in corroboration of previous testimony.

WRITING USED AS STANDARD IN COMPARISON OF HANDS must be proved to be genuine by evidence leaving no reasonable doubt, as by the testimony of persons who saw the party write it, or by an admission of its genuineness, or other evidence equally certain; and it can not be proved by the opinions of witnesses.

ERROR to the Philadelphia district court, in an action for libel. To prove that the alleged libel was written by the defendant, the testimony of persons familiar with his handwriting was introduced. Four papers purporting to have been signed by the defendant were also introduced and admitted in evidence as standards of comparison. The substance of the evidence offered to prove the genuineness of the writings before admitting them in evidence is stated in the opinion. Verdict and judgment for the plaintiff, whereupon the defendant brought error. Only three of the errors relied on are noticed by the supreme court, and the others need not therefore be stated. The first error al-

leged was that the court erred in admitting the alleged libel to be read in evidence; second, that the court erred in excluding a certain question asked by the defendant as to whether the witness knew "the defendant's character for disputing and speaking evil of others;" third, that the court erred in permitting the papers referred to to be given in evidence as standards of comparison.

Brewster and Meredith, for the plaintiff in error.

Dallas and J. M. Read, for the defendant in error.

By Court, ROGERS, J. The evidence preliminary to the introduction of the alleged libel was sufficiently strong to justify the court in submitting the paper to the inspection of the jury. The ordinary proof of the opinion of the witness was given, and under these circumstances the question, whether it was the handwriting of the defendant, was for the jury, who are the ultimate judges of the genuineness of the paper. There is nothing in the first exception. The second exception was properly abandoned: but it is insisted that there is error in permitting the plaintiff to give in evidence the papers as specified in the third exception. The doctrine in this state is, that mere unaided comparison of hands is not in general admissible. But in corroboration of testimony previously given, such testimony may be received. In *McCorkle v. Binns*, 5 Binn. 340 [6 Am. Dec. 420], it is ruled that evidence from comparison of handwriting, supported by other circumstances, is admissible. And on the same principle from a comparison of the types, devices, etc., of two newspapers, one of which is clearly proved, and the other imperfectly, the jury may be authorized to infer that both were printed by the same person. After evidence has been given in support of a writing, it may be corroborated by comparing the writing in question, with a writing, concerning which there is no doubt. The same principle is affirmed in *Vickroy v. Kelly*,¹ 14 Serg. & R. 372; *Callan v. Gaylord*, 3 Watts, 321; *Lodge v. Phipper*, 11 Serg. & R. 333; *Farmers' Bank v. Whitehill*, 10 Id. 110; *Bank v. Jacobs*, 1 Penn. 161.

But the objection is not to the general principle; but it is contended there is no adequate proof of the genuineness of the papers which are intended as the standards of comparison. And on this point I am not aware of any direct decision; although in several cases it is plainly indicated that no doubt must remain as to the handwriting of the test-paper. Thus in *McCorkle v. Binns*, the

1. *Vickroy v. Skelley*.

chief justice says, the paper must be identified beyond all doubt. And again, in the same case, he says, it may be compared with the writing concerning which there is no doubt. *The Farmers' Bank v. Whitehill* was an original administration account, settled by the defendant and his mother, respecting the estate of the defendant's father, and it was proved by the register of wills, that it was signed by the defendant and his mother, and sworn to by them. It was also admitted on the trial that it was his handwriting. Here nothing was left to conjecture or doubt. In the *Bank v. Jacobs*, the test paper was admitted to be genuine; and Mr. Justice Smith says, that when a witness has seen a person write, and declares he knows his writing, he may compare it with writings which he has seen the person write, or which it is admitted he wrote. *Callan v. Gaylord* is supposed to have a strong bearing on the point, because, in the argument, a distinction is attempted between papers admitted that it is said may go to the jury in corroboration, but not papers proved. But it must be remarked that this practice is not noticed by the court; and, in truth, there is no such distinction; for there can be no doubt that papers proved may be admitted for purposes of comparison. The difficulty is not as to the character of the proof, but the manner of the proof. The court ruled the broad principle, that comparison of hands is evidence in corroboration of other evidence which tends strongly to prove that a libel is in the handwriting of the defendant. The chief justice takes it for granted that the book, which was offered in corroboration, was, in fact, written by the defendant. It does not appear to have been denied that the entries in the plaintiff's book were in the handwriting of the defendant; and this, in truth, could not be done, as he had been in his employment as his bookkeeper.

Mr. Justice Shaw, in *Moody v. Rowell*, 17 Pick. 495 [28 Am. Dec. 317], seems to intimate that proof of the genuineness of the standard offered for comparison must be directed to the fact of its having been written by the party, by one who saw him write it. See, also, *Richardson v. Newcombe*, 21 Id. 317. We conceive it to be very material that strict proof of the genuine or test paper should be first given; that no reasonable doubt should remain on that point; and nothing short of evidence of a person who saw him write the paper, or an admission of being genuine, or evidence of equal certainty, should be received for that purpose. Any other rule would lay the doctrine open to Mr. Starkie's principal objection to the general principle, who, speaking as to the receipt of evidence as to comparison of hands, says,

that, perhaps, after all, the most satisfactory reason for its exclusion is, that if such comparisons were allowed, it would open the door to the admission of a great deal of collateral evidence, which would go to a very inconvenient length. For in every case it would be necessary to go into distinct evidence to prove each specimen produced to be genuine; and even in support of a particular specimen, evidence of comparison would be receivable, in order to establish the specimen, and so the evidence might branch out to an indefinite extent: 2 Stark. Ev. 375. This inconvenience is in a measure avoided by exacting preliminary proof which leaves no reasonable doubt as to the genuineness of the standard or test paper. This would seem to be reasonable from the very nature of a standard or test, which should itself be certain and fixed.

The preliminary evidence which was given, was an opinion of the principal witness on whom the plaintiff rested this part of his case, with the aid to be derived from the opinion of another witness, who says that the papers Nos. 1, 2, 3, and 4 are his, that is, the defendant's. It is, however, nothing more than his believing at last, as it is not pretended he saw him write them, nor is it anywhere said that the defendant acknowledged the writing to be his. There is rather stronger evidence that the specimen is not his handwriting, than of the authenticity of the alleged libel, as we have the opinion of one more witness of the one than of the other. It is very plain that without the restrictions which have been indicated, evidence of comparison of hands, would very often be used for very oppressive and pernicious purposes. As the party who offered them would have the selection of the criterion or test specimen, it would very frequently happen that it would be out of the power of the adverse party to disprove the allegation that the writing was his. In the case at bar, the libel is as much a test of the authenticity of the standard of comparison, or nearly so, as the latter is of the authenticity of the former.

As this cause goes down for another trial, we refrain from expressing an opinion on the six last errors. If the declaration be defective in any respect, as alleged, it may be amended before or on the trial.

Judgment reversed, and *venire de novo* awarded.

COMPARISON OF HANDWRITINGS: See *Homer v. Wallis*, 6 Am. Dec. 169, and note; *McCorkle v. Binns*, Id. 420; *Woodard v. Spiller*, 25 Id. 139; *Moody v. Roswell*, 28 Id. 317. In *Power v. Frick*, 2 Grant, 306, and *Depue v. Place*, 7 Pa. St. 430, the principal case is cited to the point, that upon a

comparison of handwritings, the test or standard paper must be proved by the admission of the writer, or by the testimony of one who saw him write it. The case is approved on the same point in *Travis v. Brown*, 43 Id. 16; and is cited in *Jumpert v. People*, 21 Ill. 420.

COLLINS v. SMITH.

[6 WHARTON, 204.]

REPEAL OF REPEALING STATUTE revives the original statute.

EXPIRATION OF REPEALING STATUTE BY ITS OWN LIMITATION revives the statute repealed and supplied. Therefore the Pennsylvania act of March 19, 1810, relating to unincorporated banks, was revived by the expiration of the repealing act of March 21, 1814.

ERROR to the Philadelphia district court, in an action on a certain note. The defendants filed an affidavit of defense, to the effect that the note in question was given to the treasurer of the "Schuylkill savings institution," an illegal partnership or banking association, for a certain note and check drawn by the defendants for the accommodation of a third party, which note and check were discounted by the said institution at an illegal rate of interest; and that the plaintiff, with notice of these facts, took the said note as security for a certain deposit made by him in the said Schuylkill savings institution. The validity of the defense turned upon the question, whether or not the act of March 19, 1810, forbidding unincorporated banking institutions from transacting banking business, was in force at the time of these transactions. The court below thought the defense insufficient, and directed judgment to be entered for the plaintiff, and the defendants sued out a writ of error.

Ingraham, for the plaintiff in error.

Hopkins, for the defendant in error.

By Court, GIBSON, C. J. The Schuylkill savings institution is an unincorporated banking association; and it is illegal if the act of the nineteenth of March, 1810, is still in force. That act forbade unincorporated banks to issue their notes, to lend money on business or accommodation paper, to receive it on deposit; or to do any act which an incorporated bank might do; and these prohibitions were unlimited as to duration. But an act was passed on the twenty-first of March, 1814, which created thirty-nine new banks, and which, having declared the contracts and notes of all unincorporated banks void, repealed the act of 1810 in terms, and limited the duration, not only of the new

charters, but of its own existence, to a period of little more than eleven years. Then came the act of the twenty-fifth of March, 1824, which, without again supplying the prohibitions of the act of 1810, or continuing those of the act of 1814, renewed the charters of certain banks named in it, most of which had come into existence under the act of 1814; so that the question is, whether the expiration of a statute by its own limitation, *ipso facto*, revives a statute which had been repealed and supplied by it.

It is an admitted rule of the common law, that the repeal of a repealing statute revives the original. But in *Warren v. Windle*, 3 East, 211, Lord Ellenborough suggested—for notwithstanding the synopsis of the case, and the quotation of it by text-writers and compilers, it was not decided—that there may be a difference betwixt the repeal of a repealing act, and the expiration of it, when “though temporary in some of its provisions, it may have a permanent operation in other respects. The statute 26 Geo. III., said he, “professes to repeal the statute 19 Geo. II., absolutely, though its own provisions which it substituted in the place of it, were only temporary.” If he meant by this that there may be a permanent repeal of provisions which are at the same time but temporarily supplied—in other words, that parts of a statute may be temporary, while other parts of it are perpetual—I admit it. A statute may be repealed without being supplied at all; and the providing of a temporary substitute does not necessarily make the repealing statute also temporary. That, however, is not the attribute of the statute before us; for every enactment, branch, and clause of it, was to cease at the time appointed. But if Lord Ellenborough meant to be understood that every present repeal is necessarily a permanent one, though declared by a temporary act, or that a statute may continue to operate as a repeal after it is itself defunct, he assumed what can not be granted. I have found nothing like a decision or dictum to support his suggestion; and there seems to be as little foundation for it in reason. The common law is not essentially imperishable, nor does it possess more inherent power of self-resuscitation than does a statute.

Sir Matthew Hale thought that many things which now obtain as common law, had their origin in parliamentary acts or constitutions made in writing by the king, lords, and commons, though those acts are either not now extant, or, if extant, were made before the time of memory. However that may be, the common law may certainly be repealed and supplied as a statute

may; and were it done by a statute of limited duration, it could scarce be maintained that the common law would not revive as soon as the statute were spent. We have a statute which directs that a remedy provided by the act of assembly shall be pursued in exclusion of every other, and which is *pro tanto* a substantive repeal of the common law. It happens to be perpetual; but were it temporary, we should, according to Lord Ellenborough, have nothing to supply the place of a temporary and exploded statutory remedy, when that statute would expire—a consequence not anticipated and certainly not intended. In what does the limitation of a repealing clause differ from the repeal of such a clause? It may be thought that an immediate repeal evinces a change of intention, and that no other object can be assigned for it than the revival of the original. The revival, however, arises, not from an implication of intention, but from a removal of the pressure which kept the original statute down; and were it otherwise, such an implication would equally arise from a limitation, which is a future repeal by anticipation. It is a declaration that the statute shall stand annulled at the appointed time, and be as entirely annihilated as if it had not been enacted; so that a statute abrogated by it might less properly be said to be repealed than suspended. And it can scarce be doubted that the legislature of 1814 intended only to suspend the act of 1810, and not to abrogate it. That body was not more tolerant of unauthorized banking than were its predecessors; and that it introduced new provisions only for the sake of experiment, is evident from the fact that they were of limited duration. The object was not to protect the new banks from unauthorized competition, as it might seem to have been from the limitation of the prohibition to a period co-extensive only with the duration of their charters—for other banks, having equal claims to protection, had paid for charters with longer time to run—but it was more effectually to restrain an independent mischief which had survived every attempt to suppress it.

If, then, the repeal of the act of 1810 was intended to be permanent, why were not the prohibitory sections of the act of 1814 also permanent? Perhaps it may be thought that the final disposition of the subject was purposely postponed, with a view to the result of the experiment, till further legislation should be needed for the new banks. But at the renewal of their charters in 1824, the legislature evidently thought there had been a final disposition of it already, else they would have acted on it. And

they could have thought so only by viewing the approaching expiration of the repealing act as a restoration of that which had preceded it. There was no change of temper as to these associations; for their tendency could not be disguised, and the public interest in the banking privilege was too valuable to be thrown open to those who did not pay for it. We must suppose, then, that the legislature intended to leave them to the original act; whence it results that the Schnykill savings institution, being an unincorporated association for purposes of banking, is illegal, and that the note in suit, being drawn in favor of its treasurer, is void.

Judgment affirmed.

SIMPSON v. HAND.

[6 WHARTON, 311.]

WHERE LOSS ARISES FROM MUTUAL NEGLIGENCE, neither party can recover at common law.

PRIVITY OF CONTRACT EXISTS BETWEEN MERCHANT AND HIS CARRIER, the latter being to some extent the former's agent.

OWNER OF GOODS INJURED BY MUTUAL NEGLIGENCE OF CARRIER and the master of a ship colliding with the carrier's vessel, can not recover therefor against the owners of the colliding vessel.

MASTER OF VESSEL IN MOTION COLLIDING WITH VESSEL AT ANCHOR is bound to know that the latter can not be got out of the way so readily as his own vessel can clear it, and to take measures accordingly.

FAILURE TO KEEP SIGNAL LIGHT BURNING ON VESSEL ANCHORED in the channel of the Delaware river at night, and to maintain a proper anchor watch on board the vessel, is such negligence as to prevent a recovery by the owner of goods carried thereon against the owners of a vessel in motion colliding with such anchored vessel, for an injury to the goods, although the master of the vessel in motion is also guilty of negligence, and the burden of proof lies on the plaintiff.

ACTION on the case tried at *nisi prius*, at Philadelphia, before Kennedy, J., brought by the plaintiffs, owners of certain goods shipped on board the schooner Thorn, against the defendants, as owners of the brig William Henry, for an injury to the goods occasioned by the William Henry running into the Thorn, while the latter vessel was lying at anchor at night in the Delaware river. The facts are sufficiently stated in the opinion. The judge instructed the jury, among other things, that it was the duty of the master of the Thorn to anchor her out of the channel, and that, if anchored in the channel, it was the duty of those on board to maintain a light burning during the night in

some conspicuous place on the ship, and to maintain a proper anchor watch; and that if this were done, the defendants, owners of the *William Henry*, were liable, and that "if, without this being done in the *Thorn*, she was discovered by those having the charge and direction of the *Henry*, in time to have avoided the collision, but they neglected to use the proper exertion for doing so, until it was too late, the defendants would be liable in like manner." Verdict for the plaintiffs, and motion for a new trial, on the ground of error in the instructions, and because the verdict was against the law and the evidence. The principal point of contention sufficiently appears from the opinion.

Hubbell, for the defendants.

H. Binney, jun., and J. R. Ingersoll, for the plaintiffs.

By Court, GIBSON, C. J. It is an undoubted rule, that, for a loss from mutual negligence, neither party can recover in a court of common law; and so general is it, that it was applied in *Hill v. Warren*, 3 Stark. 377; S. C., Eng. Com. L. 390,¹ to the negligence of agents, respectively appointed by the parties to superintend the taking down of a party wall. Courts of admiralty, indeed, decree according to the circumstances, so as to apportion the loss; but certain it is, that a court of law, whether for its inability to adapt its judgment to the merits of such a case, or whether for any other cause, refuses to interfere at all. It has been pressed upon us, however, that though such be the rule betwixt owners of coasting vessels or wagons, it is because seamen and wagoners are the servants of their employers, and have consequently power to affect them by their acts; that a carrier is not the servant of his employer, but an independent contractor; and that there is no more privity betwixt the owner of the vehicle and the owner of the goods, than there is betwixt the owner of a stage-coach and a passenger in it, who may, it is said, have an action against the owner of another coach driven carelessly against it to his hurt, without regard to the question of negligence betwixt the drivers. The argument is plausible, but the authorities are against it. *Vanderplank v. Miller*² was the very case of an action by the owners of goods damaged by collision; and Lord Tenterden, without adverting to the supposed distinction betwixt them and the carrier, directed that, if there was want of care on both sides, the plaintiffs could not recover. The force of the decision is attempted to be evaded by supposing the

1. 2 Stark. 377; 2 Eng. Com. L. 453.

2. 1 Moo. & M. 169.

owners of the goods to have been their own carriers: but nothing in the report gives color to such a supposition; and owners of both goods and vessel would scarce have brought their action for damage to the goods alone. That case, therefore, is in point; and though it was ruled at *nisi prius*, the counsel seem to have been satisfied with the verdict. To the same purpose is *Smith v. Smith*;¹ the difference being that the person who had the horse in charge at the time of the injury, was not a carrier, but a bailee for hire. Still he was no more than a carrier, the owner's servant; nor was he less liable, on the contract, for actual negligence. But the principle is founded in reason as well as authority. There is at least privity of contract betwixt a merchant and his carrier; and the former, when he commits the management and direction of his goods to the latter, giving him, as he does, authority to labor and travail about the transportation of them, necessarily constitutes him, to some extent, his agent; and this inference is sanctioned by judicial decision.

In *Beedle v. Morris*, Cro. Jac. 224, an owner of goods stolen from a carrier at an inn, was allowed to maintain an action for them against the inn-keeper; and as the latter is liable only for things *infra hospitium*, and to passengers and wayfaring men, as was ruled in *Calve's case*, 8 Rep. 63,² it follows that the action was maintained not on the right of property, but on the relation of inn-keeper and guest; and that the owner, to bring himself within it, was allowed to treat the carrier as his substitute. It will not be pretended that, had the inn-keeper's vigilance been put asleep by misrepresentation of the carrier in respect to the value of the goods, it might not have been set up in bar of the action; yet that would have made the owner liable to the consequences of the carrier's deceit. Neither will it be pretended that an owner could recover for special damage, occasioned by gross negligence of the carrier in suffering the goods to be tumbled into a trench cut across the highway; for that would make the author of a public nuisance answer for a private wrong which he did not commit; yet if the owner were not to be affected by the carrier's negligence, such an action might be maintained on the right of property. So far has the owner's responsibility been carried in every species of bailment, that, where beasts in the custody of another who does not appear to have been his servant, were suffered to commit a trespass, the owner of them was held to answer for it: *Viner, Trespass*, B, pl. 1. The case put of injury to a passenger from a collision of stage-coaches,

1. 2 Pick. 621; 8 C., 18 Am. Dec. 464.

2. 8 Rep. 32.

wants the essential ingredient of bailment to complete its analogy to the present; but I am not prepared to admit that even he could have an action for mutual negligence against any one but him to whose care he had committed his person. A carrier is liable to his employer at all events; and to make his associate in misconduct answerable for all the consequences of it, would make one wrong-doer respond, in ease of another, for an injury that both had committed. It is more just that the carrier should answer to his employer, rather than one in whom the employer had reposed no confidence. What remains, then, is to inquire whether there was evidence in the case before us, of mutual negligence in the conduct of those who had the vessels in charge.

That there was carelessness on board the *William Henry* was proved by her own crew. The pilot testified explicitly that the accident would not have happened if the mate, who was on the lookout, had done what was palpably his duty. The *Thorn* was perceived when she was at the distance of nearly three hundred yards; yet, though he called out to starboard the helm, the order was neither responded to nor repeated. He said further, that the mate gave him no intimation of the *Thorn's* presence till she was struck; and that had he done so while she was distant twice the length of his own vessel, he could have cleared her. The mate himself says that he gave no intimation to the pilot at all; and that his call was to the man who was supposed to have the *Thorn* in charge. It was, then, gross negligence in him to recur to a measure so uncertain, in exclusion of that which was the most natural, easy, and proper. To avoid every chance of accident from the probable drowsiness of the anchor watch, he ought to have given the order to the steersman of his own vessel, known to be on the alert. Even had it been certain that the anchor watch was equally so, he was bound to know that a vessel at anchor could not be so readily got out of the way, as it could be cleared by another in motion; and it was his duty to take his measures accordingly. Such was the evidence of negligence on board the *William Henry*; and what was the evidence of it on board the *Thorn*?

There were three points of fact to which the attention of the jury was at first directed, but from which it was unfortunately withdrawn in the sequel. The *Thorn's* position in relation to the channel; the burning of a signal light aboard of her; and the conduct of her anchor watch. As regards two of them, her position and light, there was a conflict of evidence. Four of

the six persons who composed her crew, testified that she was anchored out of the thoroughfare or customary track; that the mate set an anchor watch; and that he placed a signal lantern in the peak halliards. This was before the crew retired to their berths; but the point of time material to the question was the instant of the collision, and what was the state of things then? The plaintiffs' witnesses asserted that the light was burning in its place when they came upon deck, a few moments after the shock; while those on the adverse part, including one of the Thorn's crew, testified that no such thing was visible, and that they would have seen it had it been there. Again, the defendants' witnesses testify that the Thorn was lying in the very middle of the channel; a fact rendered probable by the depth of the water; and if she was lying there, without a light to mark her position and presence, she had not used those precautions which prudence required.

It was, indeed, ruled in *Carsly v. White*, 21 Pick. 254 [32 Am. Dec. 259], that there is no rule of positive prescription like the ordinances of Oleron, or any general usage, which requires a light to be constantly exhibited in the night-time by a vessel at anchor in the harbor; and that whether the omission of it be negligence to bar an action for a collision, must depend upon the impression made by the circumstances on the minds of the jury. A vessel is doubtless not bound to show a light when she is moored out of harm's way; but vessels run at all hours on the Delaware; and it was proved to be a custom of the river ✓ to set a light in nights of unusual darkness; and though there is no positive law to enforce it, the neglect of it must give a false confidence to an approaching vessel which she would not feel if there was no custom at all. In such circumstances, a want of conformity to the custom is an allurements to disaster. • Indeed, the hoisting of a light is a precaution so imperiously demanded by prudence, that I know not how the omission of it could be qualified by circumstances, any more than could the leaving of a crate of china in the track of a railroad car; or how it could be considered otherwise than as negligence *per se*.

Between the stories of those who spoke of the conduct of the anchor watch there can scarce be said to have been a difference. The pilot testified that he ran forward at the time of the collision, and that no person was then on the Thorn's deck. Evans, the passenger, said the same; and he, as well as the mate, declared that the first man they saw on board of her, was in the act of coming out of the cabin. McCracken, who was one of

the Thorn's crew, deposed that neither light nor watch had been set; that the crew, at the time of the disaster, were asleep in their berths; that he and Joe, the reputed anchor watch, slept together in the forecabin; and that being roused by the jar, they got on deck through the scuttle, where they found that no one had preceded them. In addition, no one pretended that an answer was returned when the Thorn was hailed. On the other side, the master of the Thorn testified that when he came up he found Joe on deck; the mate said the first man he saw on deck was Joe; and Hess, the seaman, said that he found Joe on deck forward. Now this may have been perfectly true, and yet Joe may have been asleep when his services were wanted; nor is it at all inconsistent with the testimony on the other side. The only witness who pretended to say where he was at the time of the collision, said that he was not at his station; and Joe himself was not called to contradict him. Now, though the rule is that a vessel in motion is bound to shape its course so as to pass another at rest, if need be, without its co-operation, it seems to be the custom of the Delaware for the crew of a vessel, at anchor in the stream, to give such a shear as may prevent a vessel in the act of passing, from running foul of it in case of accident. Had that been done in this instance, the disaster would have been escaped; and though the want of co-operation did not justify the mate's negligence in not taking his measures so as not to need it, it would fix an imputation of negligence on the Thorn to show that her anchor watch was not at his station in time to afford it.

Instead, then, of being told that, notwithstanding the Thorn may have been deficient in any, or all, of the preceding particulars, the plaintiffs would be entitled to recover if she was perceived on board of the William Henry in time to be avoided, the jury ought to have been told that if she was moored in the channel, without a light burning at the time; or that if her watch was not present, and did what is customary on such occasions, her people were obnoxious to such a charge of negligence as would bar the action; and that the burden of proof lay on the plaintiffs.

New trial granted.

CONTRIBUTORY NEGLIGENCE DEFLECTING RECOVERY: See *Hartfield v. Roper*, 34 Am. Dec. 273, and cases cited in the note thereto. That there can be no recovery for an injury resulting from mutual negligence is a principle for which *Simpson v. Hand* is cited as authority in *Galena etc. R. R. Co. v. Jacobs*, 20 Ill. 495; *Wynn v. Allard*, 5 Watts & S. 525; *Railway Co. v. Skinner*, 19

Pa. St. 304. The case is commented on and approved on the same point in *Lockhart v. Lichtenhaler*, 46 Id. 163, in which it was held, in accordance with an intimation in the principal case, that where a passenger on a carrier vessel is injured by a collision caused by the mutual negligence of the carrier and another party, the carrier is liable to the passenger therefor.

OMISSION BY VESSEL TO EXHIBIT LIGHT AT NIGHT: See *Carsley v. White*, 32 Am. Dec. 259. The principal case is cited as authority on this point in *Innis v. Steamer Senator*, 1 Cal. 460, where it was held to be the duty of a vessel moored in the track of other vessels in San Francisco bay on a dark night, to keep a light exposed, and that the want of such light should be deemed negligence *per se*.

INJURIES BY COLLISION OF VESSELS: See *Sprout v. Hemmingway*, 25 Am. Dec. 350, and note; *Saunders v. Towne*, 29 Id. 452; *Pennsylvania etc. Co. v. Dandridge*, Id. 543.

CASES
IN THE
SUPREME COURT
OF
RHODE ISLAND.

NICHOLS v. REYNOLDS.

[1 RHODE ISLAND, 30.]

•DEED FILED FOR RECORD IS DEEMED TO BE RECORDED from the time of its delivery to the recorder.

DEED ABSOLUTE UPON ITS FACE WILL NEVERTHELESS BE TREATED AS A MORTGAGE, if the circumstances attending its execution, and the subsequent conduct of the parties respecting it, indicate that it was regarded by them as collateral security for the payment of a debt.

IF AN ABSOLUTE DEED BE EXECUTED BY THE GRANTOR FOR TWO PURPOSES, one legal, as to secure a pre-existing debt due the grantee, and the other fraudulent, as to defraud the grantor's creditors, and there is no evidence that the grantee had any knowledge of the fraudulent intent of the grantor, the deed will be treated as a legal and valid mortgage to secure the payment of the sum due the grantee at the time of its execution.

CONVEYANCE BY A MORTGAGEE OF HIS RIGHT AND INTEREST in the mortgaged premises, is valid, even though another mortgagee, claiming by the same title, be in the actual possession of the premises, whether such conveyance is treated as an assignment of an equity of redemption, or as a technical release.

POSSESSION OF ONE HAVING A RIGHT OF POSSESSION UNDER ONE TITLE, but claiming under another, the latter being adverse, the former not, is deemed to be a possession under the title which is not adverse.

ACTUAL POSSESSION OF ONE PRIVY is constructively the possession of each, according to his title, although the party in possession claims to be in by an adverse title.

BILL in equity, praying for an account and for redemption of mortgaged premises. A. B. Rathbun, on the twentieth day of February, 1813, executed to Tillinghast, Case, and Thomas, a mortgage upon two parcels of land. The interest of Tillinghast was afterwards assigned to Reynolds, and that of Case to J. B.

Rathbun. On the sixteenth day of March, 1813, A. B. Rathbun mortgaged one of said parcels to Sarah Steere, whose interest, upon the twenty-seventh of February, 1827, was assigned to Thomas. On the sixteenth of March, 1813, A. B. Rathbun conveyed the parcels included in the mortgages mentioned above, to Elizabeth Peckham, by deed in fee simple. Elizabeth Peckham died in 1825, and John Hall and wife and others became seised of the premises as heirs at law. In 1833 Hall and wife, by their deed of quitclaim, remised and released to Nichols, the complainant, all their right and interest in the premises. The bill prayed that Reynolds, Thomas, and J. B. Rathbun be required to account to the plaintiff, and that plaintiff might be permitted to redeem. The answer of J. B. Rathbun admitted the mortgages mentioned above, but averred that the deed to Elizabeth Peckham, in 1813, had been executed by A. B. Rathbun for the purpose of fraudulently protecting his property from attachment by his creditors and to secure it to his own use. That the deed had been carried by Rathbun to the office of the town clerk and deposited with him with directions that it should not be recorded. The answer, however, admitted that, at the time, A. B. Rathbun was indebted to Elizabeth Peckham in the sum of three hundred dollars upon his promissory note. The answer further alleged that after the execution of said deed to Elizabeth Peckham, Rathbun continued in the actual possession of the premises for about ten years without interruption, without the deed ever being recorded, or ordered to be recorded, or any rent being demanded by Mrs. Peckham, and that during that time she had permitted Rathbun to hold himself out to the world as the owner of the premises. The answer further alleged that, in 1823, A. B. Rathbun, in consideration of the sum of four hundred dollars, executed to defendant J. B. Rathbun a deed poll of the lands, which deed was duly recorded, and that at the time of the execution of the deed, said J. B. Rathbun had no notice of the prior deed to Mrs. Peckham, that A. B. Rathbun had declared that the land was free of all incumbrances except the mortgages to Tillinghast, Case, Thomas, and Sarah Steere, and that the defendant had, upon the execution of the deed to him, entered into possession of the premises, and continued in possession ever since. The answer further averred that Hall and wife, at the time of their release to Nichols, were not in the actual possession of the premises. The opinion explains the facts still further.

L. Hall, for the complainants.

J. Hall, for the defendant Rathbun.

By Court. The indebtedness of A. B. Rathbun to Mrs. E. Peckham was a good consideration for the interest which his deed of the sixteenth of March, 1813, purports to convey. The lodging of the deed with the town clerk by Mrs. Peckham, and the subsequent admissions of the grantor, as testified by Hall (if he be a competent witness), and others, are presumptive evidence of its delivery. It is at least enough to prove, *prima facie*, that the deed came to her possession with the assent of the grantor. When a deed, which has never been recorded, is lodged with a town clerk, the act of lodging it, unaccompanied with any counter declarations, is itself an implied direction to record; and, other things equal, the title is complete upon its being lodged with such implied directions; for by the terms of our statute, the lodging of a deed to be recorded is equivalent to an actual entry of it upon record, so far forth as is necessary to perfect the title. The title being made complete by such lodgment, the subsequent neglect of the town clerk can not affect the grantee's rights under the deed. The deed remaining on file in the clerk's office, and open to inspection, is notice to all the world of a conveyance of the land, either absolute or conditional.

But there are circumstances attending this transaction well calculated to draw into question Elizabeth Peckham's title to an unconditional estate in this land. The debt which formed the consideration of the deed appears to have remained in her hands undischarged. The possession of the property continued in the grantor to all appearance without change of use, except that he was at times called on to settle, and was once threatened with a demand, or with a suit for the possession of the land; and further, the deed was suffered to remain on file unrecorded, until shortly before the grantee's death. The conduct of Elizabeth Peckham, then, was precisely such as if the deed had been a mortgage, or as if it had been delivered to her as collateral security for her demand; and there is nothing in the conduct of A. B. Rathbun inconsistent with this purpose, except the single fact that the deed on the face of it is absolute. From all the circumstances the grantor appears to have had two objects in view. First, to secure the debt due to the grantee. This was a good object. Second, to cover his property from the suits of his other creditors. This was a fraudulent purpose. Elizabeth Peckham would not have done herself justice had she not concurred in the first object, and accepted the deed as collateral

security for the debt then due her; and so far the transaction was perfectly honest between both parties. As to the second object, there is no proof at all that she concurred in it; there is none that she knew it; on the contrary, she treated the deed only as a mortgage; she was not, therefore, *in pari delicto*, and the deed must at least be regarded, by a court of equity, as collateral security for the debt due her at the time it was given. If the evidence by which this view is taken be competent, it is plain that the deed under this bill must stand as good. The plaintiffs must be allowed to redeem, and if Joshua B. Rathbun take any estate, it is a mere equity of redemption, subject to the prior rights of the plaintiffs.

But is the evidence competent? Mr. J. Hall is the only witness objected to as incompetent. He is the main witness in support of the bill. Without his testimony, it may be doubtful whether the bill can be sustained. Is he, then, a competent witness? The objection is, that he has not parted with his interest in the estate. Now, if the deed of Rathbun to Elizabeth Peckham is void, it is plain that Hall has no interest in this suit, for he does not appear as a party in any way, and he has merely released his interest without covenant or warranty. But if the deed be not void, he has an interest, unless he has divested himself of it by his quitclaim made to plaintiffs, before the commencement of this suit. Has he so divested himself? If the deed of A. B. Rathbun to E. Peckham be regarded as a mortgage, then the release of Hall and wife to plaintiffs may consistently in equity be considered an assignment, and, surely, a mortgagee has a right to assign an equity of redemption, even though another mortgagee, claiming by the same title, be in the actual possession of the premises. But it may even stand good as a release. The defendants, as mortgagees (and only as mortgagees does the bill regard them), were all privies in estate with the heirs of Mrs. E. Peckham, and the actual possession of one privy is constructively the possession of each, according to this title; and this, although the party in possession claim to be in by an adverse title. The following principle is laid down in 2 Stark. 657, 5th ed.: "Where a party is in actual possession, and has a right to possession under a legal title which is not adverse, but claims the possession under another title which is adverse, the possession will not in law be deemed adverse." Hence, as the actual possession of the defendants, as mortgagees, inured to the benefit of all privies, it inured to the benefit of the heirs of E. Peckham, and those claiming under them. The plaintiffs,

therefore, were in a condition to take, even by way of release, and Hall and wife's quitclaim may then operate as a release, or at least as an extinguishment of their claims under E. Peckham's deed, in favor of the plaintiffs.

Hall, then, is a competent witness, and ought not to have been named as one of the plaintiffs in the bill. The defendants ought, therefore, to account with the plaintiffs, and the plaintiffs be allowed to redeem.

DEED IS PRESUMED TO BE RECORDED from the time of its delivery to the clerk: *Booth v. Barnum*, 23 Am. Dec. 339, the note to which contains the cases in this series upon this subject; and fractions of a day will be taken notice of, when time is material, for the purpose of determining the particular time at which a deed was filed for record: *Metts v. Bright*, 32 Id. 683, and note.

ABSOLUTE DEED MAY BE SHOWN TO BE A MORTGAGE, and parol evidence is admissible for that purpose. The cases in this series upon this subject are collected in the note to *Swart v. Service*, 34 Am. Dec. 211.

CONVEYANCE BY A GRANTOR OUT OF POSSESSION: See *Hall v. Ashby*, 34 Am. Dec. 424, and note.

PRESUMPTION OF LAW IS THAT A PARTICULAR POSSESSION IS NOT ADVERSE, but is in subordination to the legal title: *Rung v. Shoneberger*, 26 Am. Dec. 95; *Jackson v. Sharp*, 6 Id. 267; a possession is not adverse unless accompanied by a claim to the entire title: *Jackson v. Johnson*, 15 Id. 433; the subject, what constitutes adverse possession and how it may be established, is illustrated in the note to the case first above cited, in which the authorities, both in this series and elsewhere, are collected.

SWEET v. JENKINS.

[1 RHODE ISLAND, 147.]

LOCAL USAGE INCONSIDERENT WITH A CONTRACT made at the place where such usage prevails, is not a part of such contract, and can not be given in evidence to contradict or avoid it.

THE opinion states the facts.

Samuel Y. Atwell, for the plaintiff.

• *Richard W. Greene*, for the defendant.

By Court, DUFFEE, C. J. This action was brought for the breach of the special contract set forth in the declaration. According to the terms of the contract as declared on, the plaintiff was to labor for the defendants for one year, for which the defendants were to pay him the sum of one dollar and forty-two cents per day. It appeared in evidence that the plaintiff, after making this contract, hired a tenement in Mansville, where it

was to be performed, entered into the occupation of it with his family, and commenced labor, and was shortly afterwards discharged. The plaintiff, not acquiescing in the discharge, but still insisting on the fulfillment of the contract as he understood, or seemed to understand it, repeatedly offered to continue to labor pursuant to its terms, but his offers were declined. The admission or declarations of the agent made at the time, were the principal, if not the only evidence, relied upon to prove the terms of the contract. Whether this evidence was sufficient or insufficient, is not for the court to determine. The counsel for the defendants then offered to prove that there was a usage at Mansville in reference to and with a perfect understanding of which this contract was made, and that by that usage, either party might terminate a contract to labor for a given time at will, without assigning any reason for so doing. To a majority of the court, this usage seemed to be against the express terms of the contract, and in fact to annul it, and the evidence in relation to such usage was not permitted to pass to the jury. The jury, after having been charged that every essential particular of the contract set forth in the declaration should be satisfactorily proved, returned a verdict for the plaintiff, and gave damages to the amount of three hundred and sixty-seven dollars and fifty-seven cents, and costs. The defendants then moved for a new trial, on the ground that the evidence of the usage of Mansville was not permitted to pass to the jury, and on the ground that the damages were excessive. The motion was continued to the present term, when, after argument and further advisement, a majority of the justices (Durfee and Haile) delivered the following as the opinion of the court:

This motion does not specifically set forth what the usage sought to be proved was. Undoubtedly, usages not inconsistent with the entire contract and of which the parties have notice and with reference to which the contract is made, may be given in evidence. This court has permitted evidence of a usage to discharge, on giving a fortnight's notice, to be proved in the trial of an action for the breach of a contract similar to that described in the declaration; for in such a case a contract, absolute on the face of it, is complete at its inception and may well stand consistently with the usage, just as a deed, absolute on the face of it, may stand with a condition existing in parol, which makes it a mortgage. But in the case at bar, the contract and the usage can not stand together. Either the contract must prevail and make void the usage, or, the usage must prevail and make

void the contract. And, can there be a doubt which of these alternatives should be sustained at law? At law, the contract is valid—is a legally binding contract from its inception, and shall that law permit a usage to be proved, which makes it void at and from its inception? We must take the contract to be precisely as described in the declaration, for the same reason that we take the usage to be as described by the defendants. Now, the contract described in the declaration, is not a contract made with reference to the usage, but against it. The contract described, is to labor for a year, but the usage terminates it at will. The contract is, by the very fact of its existence, a protest against the usage, for it ceases to be a special contract the moment that the usage is made a part of it.

But, considered in connection with the usage, the contract has no legal obligation, and the usage must, in that point of view, be regarded as inconsistent with the contract. Let the usage explain the contract and what are the terms of the arrangement into which the parties entered? They are these: the plaintiff promises and undertakes for a certain sum to work for the defendants for and during the space of one year, if he chooses, and the defendants engage to pay and employ him for that time, if they choose. This is the contract, if it may be so called, which the verbal agreement, coupled with the usage, makes for the parties. Now, until the expiration of the year and the continued acquiescence of both parties in these terms, the contract has no binding force whatever; neither party can break it; no law can enforce it; and at the end of the year it would not be a contract in virtue of the force of its original terms, but in virtue of such continued acquiescence. The contract, if the usage be a part of it, is at its inception incomplete, without a legal obligation, and, therefore, in law a nullity. But the contract declared on is complete at its date; it is prospective; its legal obligation is entire and susceptible of being broken by either party at any time during its continuance. A usage which annuls such a contract can not be given in evidence, without subverting the well-settled rule, that usages inconsistent with a contract, can not be given in evidence to affect it; nor, without establishing the very reverse of that rule; to wit: that usages which ride over and even annul any special contract made with notice of the usage, may be given in evidence.

Again, the usage appears to be contrary to law, inasmuch as it incapacitates certain persons in Mansville for making contracts similar to the one declared on. It is in vain to say that

the parties might protest against the usage. It is sufficient that the law imposes upon them no such necessity, and if it did, the contract itself, from the very fact that it is against the usage and can not subsist along with it, is as strong a protest as can be made. Where parties contract for a given time, if they can agree, this court has always required proof of some justifiable cause for a disagreement, but the usage in question refuses to assign any cause whatever.

The damages may be large, but they are not so excessive that the court can grant a new trial for that cause. In this opinion we all agree.

The motion for a new trial is therefore overruled.

USAGE MAY BE SHOWN TO INDICATE THE INTENTION of parties to a contract but not to thwart that intention: *Kendall v. Russell*, 30 Am. Dec. 696; and if a usage is shown to exist in relation to a particular trade or pursuit, contracts by persons engaged in such pursuit are presumed to refer to the usage, if it was generally well known and established: *Sampson v. Gazum*, Id. 578. Evidence of usage is admissible to explain the terms of a written contract: *Boorman v. Jenkins*, 27 Id. 158; but the parties must have contracted with reference to the usage: *Eager v. Atlas Ins. Co.*, 25 Id. 363, the note to which contains other cases previously reported in this series.

STATE v. WILBOR.

[1 RHODE ISLAND, 199.]

CRIMINAL JURISDICTION OF COURTS OF JUSTICE for trial of causes upon indictment or information, is derived from the general law providing for the organization of courts of justice, and not from particular statutes declaring what shall constitute public offenses, and prescribing a punishment therefor.

AMENDATORY STATUTE PROVIDING FOR THE DISTRIBUTION OF A FINE imposed as a penalty for a public offense, which provides only for the distribution of such penalty in a manner different from that directed in the original act, does not affect the offense defined by such act, nor work a repeal of the penalty.

INCREASED PENALTY IMPOSED BY A STATUTE FOR A SECOND CONVICTION of the offense described therein, is not regarded as an increased penalty imposed for the same offense, but as a new and distinct penalty provided for another and a separate offense.

INDICTMENT WHICH CONCLUDES "AGAINST THE FORM OF THE STATUTE," will support a conviction, although the offense charged is the creation of several statutes.

STATUTES IN RELATION TO THE SAME OFFENSE must be taken together and construed as if the matters to which they relate were embraced in a single statute.

INDICTMENT charging defendant with having sold liquors in quantities of less than ten gallons without a license. The statute by which the act charged was made an indictable offense, was passed in 1844. By that statute the penalty imposed was fifty dollars, one half of which was to go to the town in which the offense was committed, and the other half to the state. In 1846 this act was amended by directing that half of the penalty should go to the complainant and the other half to the state, and by further providing that upon a second conviction the offender should forfeit one hundred dollars, and for every subsequent conviction the sum of two hundred dollars. Defendant was convicted, and moved in arrest of judgment on the grounds: 1. That the indictment did not state a public offense. 2. That the court had no jurisdiction to pass sentence upon the verdict.

J. M. Blaks, attorney-general, for the state.

W. H. Potter, for the respondent.

DURHAM, C. J. This court derives its power to carry an indictment or other common law criminal proceeding from the presentation of the bill or information to final judgment, not from particular statutes for making certain acts offenses against the state or for establishing certain municipal regulations, but from the act which constitutes and organizes it as a court. A repeal or alteration in any such municipal regulation or statute touches not the power of the court, however it may change its objects or mode of action. Hence, when a statute is in part repealed or altered, it becomes not a question of power, but of interpretation. In other words, the court is to inquire how the original and amendatory acts taken together are to be understood, according to the common law rule for interpreting statutes, and having thus ascertained their true intent, it is bound to carry that intent to its final effect, if those forms of law through which it must act will admit of it. Now the act in amendment of an act, authorizing town councils to grant licenses and for other purposes, does not affect the power of the court; it calls upon the court to construe the two acts together and give them such a construction as shall render them, if practicable, consistent with each other and with our common law forms of proceeding by indictment.

In as far as any question arises in considering this motion, the two acts are in no sense inconsistent with each other, except in relation to the distribution of the penalty. In every other

respect, whether we consider the penalty itself, the proceedings by which it is recovered, or the act by which it is incurred, the two statutes are perfectly consistent with each other and nothing is changed. But then in considering these statutes in the case of *The State v. Fletcher*,¹ the court did find that the new distribution of the penalty did affect certain rights of the town (which before the passage of the amendatory act was entitled to half the penalty in all cases), by transferring those rights, except where convictions had already been obtained, to the complainants. But this did not change the offense or repeal the penalty—it only repealed the mode of distribution given by the tenth section of the amended act. Yet, though it only affected the mode of distribution, the court was and still is of opinion that the offense, created by that section, and the penalty there given, remain unchanged, and that the only difficulty in recovering it lies in the fact that the amending act has left the court no mode, so long as it pursues the common law course of adjudication, whereby it can distribute any penalty, incurred prior to the day on which the amending act went into effect, except in those cases where convictions had already been obtained. To have taken a penalty, which had been already incurred and to the one half of which the town was entitled under the statute before it was amended, and to have given it to the complainant, would have been to have given the amending act a retroactive effect and to have invested the complainant with rights to which, up to the day on which the amending act went into effect, he was a stranger; and that in derogation of the rights of the town and against the language of the statute.

It will here be perceived, that this opinion did not touch the penalty itself, nor did it touch in any respect the rights or liabilities of the respondent. It was an incident of that opinion, rather than its direct effect, that operated his discharge. The court could not give the half of the penalty to the town, because the amendment provided for a sentence that should give it to the complainant, if a conviction had not been obtained, and it could not give it to the complainant, because the act, which was amended, gave it to the town, from which it could not be taken without giving the amending act a retroactive effect. If this opinion be correct, and if the amendatory act does not touch the offense or the penalty, but only relates to the form of the judgment by which it is to be distributed, the court can not comprehend how it is to operate a repeal of that penalty, or how it is to take from the

court the power of rendering judgment, in any case in which the penalty can be distributed consistently with the intent of both acts, considered together, and with the rights of the parties entitled to it. The defendant is indicted for an offense, committed subsequently to the passage of the amendatory act; but the questions which the former opinion decided, grew out of offenses committed prior to its passage—none of the questions, therefore, decided by the former opinion necessarily arise here, nor do any of the principles, on which that decision was grounded, properly belong to a consideration of the present question.

It is said the penalty is made by the amending act greater, inasmuch as it is provided that for a repetition of the offense it may be doubled. This is a possible contingency, but not an incident of the sentence. The respondent may again violate the law, but this depends wholly upon his own will. It is not a right of which the sentence will deprive him, nor any result, which the court can anticipate, or which it can take into consideration as a part of its sentence. It can not consider the penalty, by such possible contingency, as increased. To do so would be to presume that the breach of law would be repeated, and to be solicitous, not for the preservation of the rights of the respondent, but to guarantee to him impunity in wrong doing. This is not the proper business of the court. At any rate, the double penalty is a penalty imposed by the amending, and is in no sense inconsistent with the amended statute. It is a new penalty, and just as distinct from the old, as if it were to be imposed upon any contingency other than the sentence now to be passed.

It is said that the state can not rely upon both statutes, since the indictment concludes by alleging that the sale was "against the form of the statute," and not "statutes" "in such case made and provided." But it has been decided—and we are not aware that the correctness of the decision has heretofore been questioned—that under such an indictment, an offense may be proved and the indictment sustained, although the offense may be the creation of a number of statutes. All the statutes in relation to the same offense must be taken and construed together as if they were one statute.

With these views of the question, which the counsel for the respondent have presented for the consideration of the court, we are under the necessity of overruling the motion in arrest of judgment.

JURISDICTION OF COURT DERIVED FROM STATUTE: *Hunt v. Jennings*, 33 Am. Dec. 465.

STATUTE PRESCRIBING NEW REMEDY FOR OFFENSE punishable at common law does not affect the common law remedy, unless there are negative words excluding it: *Wetmore v. Tracy*, 28 Am. Dec. 525, and note.

INDICTMENT CONCLUDING "AGAINST THE FORM OF THE STATUTE" is good although the offense charged is also punishable at common law: *Respub. v. Newell*, 2 Am. Dec. 381; if the statute only prescribes a punishment for that which was a crime before, the indictment need not conclude "*contra formam*." *Commonwealth v. Searle*, 4 Id. 446; *People v. Enoch*, 27 Id. 197, the note to which contains citations of cases upon this subject.

STATUTES RELATING TO SAME OFFENSE must be construed together: *Montesquieu v. Heil*, 23 Am. Dec. 471, and note.

CASES
IN THE
COURT OF APPEALS
OF
SOUTH CAROLINA.

POTNAM v. CRYMES.

[1 McMULLAN'S LAW, 9.]

PROMISSORY NOTE PAYABLE TO A PARTICULAR PERSON OR "HOLDER" is a valid promissory note, transferable by delivery, and the holder may acquire a lawful title by delivery in the same manner as if the word "bearer" had been used.

ASSUMPSIT on a promissory note payable to Mancil Owens or holder. The plaintiff sued as holder. Demurrer. The lower court overruled the demurrer. and defendant appealed.

Sullivan and Campbell, for the defendants.

Irby and Wright, contra.

By Court, BUTLER, J. The word bearer is usually inserted in a negotiable note, transferable by delivery. But without it, the maker of a note may make it transferable by delivery, either by circulation, or using a word of precisely the same import. As if a note were made payable to A. B., or to any one to whom he may deliver it; or to any one who might hold the same by delivery. In both cases the bearer would be sufficiently meant and designated, although the word was not used. If it was the intention of the maker to make it payable to any one who acquires possession by delivery, he has no right to complain when it is presented to him without a written transfer. Holder is a word of the same import as bearer, and both may acquire a title by lawful delivery, according to the terms of the contract. All the law requires is, that the paper must have negotiable words on its face, showing it to be the intention to give it a

transferable quality by delivery; otherwise the instrument must be transferred by written indorsement, if payable to order; or sued on by the original payee, if there are no negotiable words at all.

The decision below is affirmed: the whole court concurring.

WORDS IN PROMISSORY NOTE SUFFICIENT TO CONSTITUTE NEGOTIABILITY: *Noland v. Ringgold*, 5 Am. Dec. 435; *Gerard v. La Cote*, 1 Id. 236.

BENTLEY v. REYNOLDS.

[1 McMULLAN'S LAW, 16.]

WORDS NEED NOT BE NECESSARILY DEFAMATORY in order to be actionable. FALSE ASSERTIONS PRODUCTIVE OF ACTUAL DAMAGE to the person concerning whom they are uttered, will enable him to sustain an action of slander, provided, that the damage of which he complains was not the result of any acts of others, to whom such words were spoken, of so unlawful a character, that an action for relief might have been sustained against such persons themselves.

ACTION MAY BE MAINTAINED FOR FALSE AND MALICIOUS ASSERTIONS by which creditors of plaintiff were induced to cause attachments to be levied against his property, which otherwise might not have been levied, and it is not material whether the words were spoken in relation to any particular trade or employment of the plaintiff.

CASE. The opinion states the facts.

Dawkins, for the appellant.

Thompson, *contra*.

By Court, EVANS, J. This is an action on the case. The declaration sets out, with sufficient certainty, the following facts, viz.: 1. That the plaintiff, a citizen of Union district, was absent from home attending to some private business, at or in the vicinity of the town of Columbia. 2. That whilst he was thus absent, the defendant, falsely and maliciously, and with intent to injure him, and to produce a belief amongst his creditors that the plaintiff was unable to pay his debts, and had absconded, and so concealed himself that the ordinary process of law could not be served upon him, said, of and concerning him, that the plaintiff had left the country, and would not return; that all his property, consisting of land and negroes, and other chattels, belonged to him, the defendant, until the plaintiff's return; and if he never returned, was his absolutely. 3. That in consequence of these false reports, divers of the plaintiff's creditors, believing him to be an absconding debtor, sued out, and levied

on his property, divers domestic writs of attachment, which they would not have done, but for the false statements of the defendant. 4. That by reason of the premises, the plaintiff was obliged to return, suddenly, to Union, leaving his business at and near Columbia unfinished, whereby he was put to great trouble and expense; and that he sustained great loss and damage in paying the costs of the attachments, and discharging his property from the liens thereof. To this declaration there was a general demurrer, which was overruled by my brother Gantt, at the extra court for Union, in March, 1839, and the case came on for trial, before me, at the regular term of the court the week after. On the trial, all the material allegations in the declaration were proved by witnesses, and the plaintiff had a verdict. The defendant appealed, and moved this court to reverse the decision of the circuit court on the demurrer, on the ground that no action lies on the case made in the declaration and proved on the trial. There are some other grounds, but this is the only one which it is thought necessary to consider.

The case has been held under advisement for some time, on account of some diversity of opinion among us. During this interval, I have turned my attention particularly to that class of wrongs, for remedy of which an action on the case lies, and the result of my examination has been that the imagination of man can scarcely conceive of a case where one man has sustained a direct pecuniary loss by the unlawful act, the fraudulent conduct, or the malicious words of another, for which an action on the case will not lie. The broad rule as laid down in Comyn's Digest is, "that where one man has sustained a temporal loss, or damage, by the wrong of another, he may have an action on the case, to be repaired in damage." I do not propose to consider the great variety of cases in which relief is granted in this form of action, but shall confine myself solely to the inquiry, whether the plaintiff's action can be sustained, according to the rules of law, and the authority of adjudged cases. To do this, we must understand the proper import of the defendant's words, as laid in the declaration, and proved on the trial. As I understand them, they mean: 1. That the plaintiff had conveyed to the defendant all his property, without making any provision for his debts, and consequently, intended to defraud his creditors. 2. That he had removed, or was removing, out of the state, without paying his debts, and was therefore either an absent or absconding debtor. These words, if spoken of a merchant or tradesman, would have been actionable *per se*. They

are defamatory, for it is said in 1 Com. Dig. 260, title Action on the Case, D, 25, that for saying of a merchant or tradesman, "that he is fled and gone, and I shall lose my debt;" or "that he is runaway, and never will return," an action lies. Now, it can not be questioned that defamatory words, which, if spoken in relation to one's trade or employment, are actionable *per se*, the same words, if spoken of another class of persons, are actionable, if the person of whom they are spoken has sustained, in consequence thereof, a direct pecuniary loss.

But the authorities go still further than this. In Chitty's Practice, vol. 1, p. 44, after enumerating the various classes of words which are actionable on the presumption of damage, and dividing them into four classes, he says: "Fifth, any words occasioning actual damage." Thus in *Shephard v. Wakeman*, 1 Lev. 58, "where the plaintiff was to be married to such a one who intended to take her to wife, and the defendant, falsely and maliciously, to hinder the marriage, wrote a letter to that person, that the plaintiff was contracted to him, whereby she lost her marriage. After verdict for the plaintiff, it was moved that the action lieth not, the defendant claiming title to her himself, like as *Garard's case*, 4 Co.,¹ for slander of title. But after divers motions the plaintiff had judgment, for it is found malicious and false." This case fully sustains the text in Chitty, that words occasioning actual damage are actionable, and that it is not necessary they should be defamatory. This doctrine, however, must be taken subject to the limitation that the injury complained of must not be the unlawful acts of others, because they are answerable themselves, and the damage sustained must be the immediate consequence of the defendant's words: 8 T. R. 1;² 2 Stark. Ev. 872. In conclusion, I am satisfied the loss sustained by the plaintiff was the direct consequence of the false and malicious assertions of the defendant. It is so alleged in the declaration, and was so proved on the trial; and also, that the suing out the attachments was not such an act as would have sustained any action, against those who sued them out, by the plaintiff. It is alleged in the declaration, and the demurrer admits it, that the design of the defendant was to produce a belief among the plaintiff's creditors that he had absconded, and so concealed himself that the ordinary process of law could not be served. He has no ground to complain that they believed him and acted accordingly.

The motion dismissed.

1. *Garard v. Dickenson*, 4 Co. 12.

2. *Fleets v. Willocks*, 8 East, 1.

GANTT, O'NEALL, EARLE, and BUTLER, JJ., concurred. RICHARDSON, J., dissented.

WORDS IMPUGNING THE SOLVENCY OF A PERSON AND IMPAIRING HIS CREDIT, are actionable, though not spoken in relation to his trade or pursuit: *Davis v. Buff*, 34 Am. Dec. 584, in the note to which the cases previously reported in this series will be found.

BARNWELL v. MAGRATH.

[1 McMULLAN'S LAW, 174.]

OBSTRUCTION OF A WAY BY THE ERECTION OF A GATE THEREON, which may be opened and shut at pleasure, is not such an obstruction as will operate to extinguish the claimant's right of way, however long it may have been continued.

CASE. In 1794, Shubrick laid out the village of Belvidere, and afterwards closed up the streets so laid out, except the one in dispute, leading from the proposed town-site, to a wharf on the river. As far back as the memory of the witnesses extended, for a period of more than forty years before the commencement of this action, a gate was erected, and had ever since stood across the road. The gate was fastened by a latch. The plaintiff had been allowed to pass until he claimed the privilege as a matter of right, when the gate was shut and locked. The jury found the plaintiff to be entitled to the way. Defendant appealed.

A. G. Magrath, for the defendant.

McCready and Masyok, contra.

By Court, EARLE, J. The verdict of the jury has established, that the plaintiff had a right to the private way which he claimed. It is not material to the determination of the question, made on the motion for a new trial, to inquire how the right was first acquired. The agreement between Colonel Shubrick, under whom plaintiff derives title, and the three persons who then owned the premises now held by the defendant, first gave rise to the way in question; and is supposed to have been a dedication of it to the public. But as the attempt to build up the village of Belvidere proved abortive, there was no public to acquire the right of way there, by actual use, which was confined to the covenanters themselves, and those claiming under them. The use was strictly private, and seems to have been continuous for more than twenty years. The land on which the way lies, belonged to Shubrick. It is not the case of a private

way over another's land, and of an obstruction by the owner. Shubrick dedicated the way, or granted the right to use it, to Edwards, Grant, and Simons, from whom the defendant derived title, and to all others, as the street or road of Belvidere. The plaintiff derives title from Shubrick, to a portion of the same lands, composing Belvidere, to which the way was appurtenant, and may be said, therefore, to have the right of way, by express grant, or by necessary implication. We can not suppose the absurdity in a legal point of view, that Shubrick, by granting to others a right of way, should deprive himself, and those holding under him, of the right to use the way. The defendant's title deeds and accompanying plats demonstrate, not only that the way is not over his soil, but that the existence of it has been admitted by those under whom he claims, as well as by himself. The court is therefore satisfied there is abundant evidence to sustain the plaintiff's right of way.

This right, however, is supposed to have been extinguished by a long-continued obstruction, and as the defendant's gate was put up on the way in 1829, which was an appropriation of it to himself, and a denial of a right to others to pass over it, that the plaintiff's right of action was likewise gone. No doubt a right of way may be extinguished in several modes; and especially the erection of a permanent obstruction, which necessarily hinders the exercise of the right, would operate to annihilate it. How long such an obstruction must be permitted to exist, in order to raise a presumption that will overthrow the right, or lose the remedy by action, we need not consider. The only question on this part of the case is, whether the erection of a gate across the way, which is opened and shut at pleasure, by all who pass, is such an obstruction as would have the effect to extinguish the right of way; and we are clearly of opinion that it is not. It is a modification of the right which may be prescribed; but it is not an obstruction that prevents or hinders the use of the way; and, therefore, however long continued, would not have the effect of extinguishing the right, or of barring the remedy. In *Capers v. Wilson*, Mr. Justice Nott expresses a doubt whether a gate of that kind would be such an obstruction as would give a right of action. We think, therefore, that the verdict is right, and the motion to set it aside is refused.

The whole court concurred.

PERMANENT OBSTRUCTION OF AN EASEMENT BY THE PARTY HIMSELF WILL DESTROY IT: *Taylor v. Hampton*, 17 Am. Dec. 710; but omitting to remove an obstruction placed there by the defendant is not an abandonment: *Rogers v. Stewart*, 26 Id. 296.

GALLIOTT v. PLANTERS AND MECHANICS' BANK.

[1 McMILLAN'S LAW, 209.]

RENEWAL OF A NOTE PREVIOUSLY GIVEN BY THE SAME PARTIES is not a continuation of a prior obligation, but is a new, separate, and distinct contract.

PARTNER CAN NOT BIND THE FIRM AFTER DISSOLUTION by his individual act in the partnership name, without express authority for that purpose.

PUBLICATION OF NOTICE OF DISSOLUTION OF COPARTNERSHIP in a newspaper is sufficient notice of such dissolution, to one taking a promissory note upon the faith of the firm's subsequent indorsement.

ASSUMPSIT. A promissory note bearing the names of Galliot & Lefevre as indorsers was discounted by the Planters and Mechanics' bank. The note was dated December 31, 1837. The partnership between the defendants, indorsers, had been dissolved on November 14 of the same year. Notice of such dissolution was published in the newspapers. The note was a renewal of another note by the same drawer, indorsed by defendants, and was regularly presented and protested. The indorsement was shown to have been made by the wife of one of the defendants, he being unable to write, but it was not shown that the firm while in existence had given her any authority for that purpose. Verdict for plaintiff. Defendant moved for a new trial.

Cooper, for the motion.

Memminger, *contra*.

By Court, **EARLE, J.** The copartnership of the defendants having been dissolved before the making of the note in question, and notice having reached the plaintiff, neither of them could bind the other by signing the partnership name, without express authority. It does not vary the case at all, that the note sued on was a renewal of one indorsed and discounted before the dissolution. It is well settled that each renewal is a new contract. If Lefevre himself could not bind Galliot by signing the partnership name, it would be very strange if a third person, although the wife of one of them, could do it without authority from either. The revocation of all that she had previously done, was complete by the act of dissolution, and there is no proof of any given to her afterwards, either by Galliot or Lefevre. The plaintiff, therefore, can not recover on the note. It is equally clear that he can not recover on the money counts. To say that a note discounted by the maker, is evidence of money lent to the indorser, is a novelty. Such a proposition is opposed to the

common usage and general experience of men, and the defendants could only be charged upon clear and explicit proof, that in fact, the note was discounted for their benefit, and that they received the money.

Motion granted.

The whole court concurred.

PUBLICATION OF NOTICE OF DISSOLUTION OF COPARTNERSHIP in a newspaper is sufficient as to strangers: *Watkinson v. Bank of Penn.*, 34 Am. Dec. 521, in the note to which the cases in this series upon this subject are referred to.

PARTNER'S ACTS AFTER DISSOLUTION of the partnership will bind the other partners unless notice of the dissolution be given: *Price v. Tousey*, 14 Am. Dec. 81; but a partner may assign the firm's interest in a bond: *Morse v. Bellove*, 28 Id. 372; a partner can not, however, bind the firm, by indorsement after dissolution: *Nott v. Downing*, 26 Id. 491.

STATE v. JONES.

[1 McMULLAN'S LAW, 286.]

WORDS "WARRANT AND ORDER" MAY BE STATED CONJUNCTIVELY in indictment for forgery without vitiating it, although in the statute under which the indictment is framed the disjunctive expression "warrant or order" is employed.

NO MATERIAL VARIANCE EXISTS BETWEEN AN INDICTMENT FOR FORGERY and the proof adduced in support of it, where the indictment describes the forged instrument as a "paper writing," and the proof shows it to have been partly printed, and partly written.

INDICTMENT NEED NOT SET FORTH that a bank was incorporated under the laws of this state or of the United States, by a specific allegation, but if it be averred that a forgery was committed, with intent to defraud a particular bank, describing it by its corporate name, and it appears that there is such a corporation incorporated by a public statute, the court will take judicial notice of such act of incorporation, and the indictment is sufficient without any further designation of the bank by its name.

AVERTMENT THAT AN INSTRUMENT WAS FORGED, with intent to defraud an incorporated bank, is not rendered defective by the fact that the instrument, as set out in words and figures in the indictment, appears to be a check drawn upon the "cashier" of such bank.

INDICTMENT CHARGING THAT A WRITTEN INSTRUMENT purported to be the warrant and order of "Tristram Tupper," and then setting forth the instrument in words and figures in full, avers that it was forged with intent to defraud "Tristram Tupper," is not objectionable on the ground of variance, merely because the copy of the instrument shows that it was signed by "T. Tupper."

DATE OF A FORGED CHECK IS SUFFICIENT EVIDENCE of the place where it was made, if it be shown also that the defendant was in that place at the date of the check and had it in his possession.

CONVICTION FOR FORGERY IN SOUTH CAROLINA MAY BE SUSTAINED, either under the act of 1736, or the act of 1801, or at the common law.

INDICTMENT for forgery. The indictment charged the false and felonious making, uttering, and publishing of the following paper writing:

"No. 73. Charleston, S. C., February 19, 1840. Cashier of the bank of Charleston, So. Ca., pay to Geo. W. Jones, or bearer, thirty-two dollars (\$32.00). T. TUPPER."

It was proved that defendant had endeavored to negotiate this check in Charleston on the day of its date. The forgery was also established beyond question. The following exceptions were taken, and urged on this appeal from a judgment of conviction, in support of a motion for a new trial: 1. The indictment described the forged instrument as a "certain warrant and order:" the language of the statute under which it was drawn was "any warrant or order." 2. The instrument was described as a "certain paper writing," and the proof showed it to have been partly printed and partly written. 3. The indictment did not allege that the corporation which it was intended to defraud was incorporated under the laws of the state. 4. The indictment alleged that the intent was to defraud the bank of Charleston, S. C., while the check itself appeared to be drawn upon the cashier of that bank. 5. The indictment alleged that the check purported to be the check of Tristram Tupper, while the check was signed T. Tupper. 6. The indictment alleged that the intent was to defraud Tristram Tupper, while the tenor of the check showed it to be the check of T. Tupper. 7. There was no proof where the check was forged. 8. The jury was charged that the prisoner might be convicted under the act of 1736 or the act of 1801, or at common law, although the offense was charged to be against the act of assembly, etc.

Simmons and Wilson, for the motion.

Bailey, attorney-general, contra.

By Court, O'NEALL, J. The different grounds of the prisoner's motion have received from the court a deliberate consideration, and it is now my duty to give the judgment upon them. This shall be done in as few words as possible.

The first ground objects to the manner in which the indictment describes the instrument forged, "a warrant and order," when the acts of 1736-7, and of 1801, speak of "a warrant or order." I had, on the trial below, and I have now, no doubt

that the indictment sets it out properly. The legislature employs two words to describe the same thing. A warrant for the payment of money or the delivery of goods, is an order, and an order for the same purpose is also a warrant. Indeed, the manner in which they are used in the acts: "any warrant or order for the payment of money or delivery of goods," shows that one instrument was intended to be described. The same thing is supposed to be accomplished by either, and hence having the same effect, they must have the same meaning. They are synonymous, and have been always so regarded. In *The State v. Holly*, 1 Brev. 37, decided in 1800, by Waties, Bay, Johnson, Ramsey, and Trezivant, it was said, "that the obvious meaning of the words 'warrant or order,' in the sense used in the indictment, can not be fairly misunderstood, the words being evidently intended to express the very same thing." And they held, although in that case they were used disjunctively, "warrant or order," yet that the indictment was good. It is clear, beyond all doubt, if they mean the same thing, they ought to be laid conjunctively, and using them otherwise might be objected to.

The second ground objects that the forged instrument is described as a "paper writing," when it is partly printed and partly written. There is unquestionably nothing in this ground. An instrument signed by a party is, in legal parlance, the paper writing of such a party. It is his signature to it which gives it that character, and not the body of the instrument. In a declaration on a note of hand, it is described as a note in writing, although every word except the signature may be in print. So of a bond partly written and partly printed, it is said to be "the writing obligatory" of the partly executing it. The manner in which an instrument forged is to be set out is well settled. In 3 Com. L. 1040, it is said, "every indictment for forgery must set forth the instrument charged as fictitious, in words and figures, so that the court may be able to judge from the record, whether it is an instrument in respect of which forgery can be committed." This rule is fully complied with in this case, for the warrant and order is exactly set out.

The same author, at the same page, says: "Though it is sufficient to aver that the defendant forged a certain writing, describing it truly, and setting forth its tenor, it seems more proper to lay it as a certain paper writing, purporting to be [one] which the statute on which the indictment is framed, describes." The instrument in this case is described in the very words used

in this case. I have looked into *Water's case*, 3 Brev. 507, and have been permitted to examine the indictment on file in the clerk's office; the bank note in that case was not described as partly printed and partly written. That indictment was drawn by Mr. Justice Richardson, then attorney-general, and the prisoner defended by Mr. Wilson, one of the counsel for the prisoner now before us. No objection was taken to the indictment on that account. The only case in which I have observed that the instrument was described as partly printed and partly written, is the case of *Rex v. Wilcox*, 1 Eng. Crown Cas. 50. In that case the judgment was notwithstanding arrested, because the indictment did not state what the instrument was of which the forgery was alleged to have been committed, nor how the party signing it had authority to sign it.

The third ground insists that the indictment does not set out that the party whom it is intended to defraud, if a corporation, was in the United States, or within this state, or if a person was resident in this state, or within the United States. This particularity is supposed to be necessary under the act of 1801, 2 Faust, 379, which in the first section provides "that if any person, from and after the passing of this act, shall, within this state, falsely make, forge, or counterfeit, or willingly act or assist in the false making, forging, or counterfeiting of any deed, will, testament, bond, writing obligatory, bill of exchange, promissory note for payment of money or delivery of goods, bank note, for payment of money, of any incorporated or unincorporated bank or company within this state or any of the United States, or any indorsement or assignment of any bill of exchange or promissory note for payment of money, or of any bank note for the payment of money, of any incorporated or unincorporated bank or company within this state or any of the United States, or any acquittance or receipt, either of money or goods, or any acceptance of any bill of exchange, or the number or principal sum of any promissory note or bank note, for the payment of money, of any incorporated or unincorporated bank or company, in this state or any of the United States, or the number or principal sum of any accountable receipt for any note, bill, or other security for the payment of money, or any warrant or order for the payment of money, or delivery of goods, with intention to defraud any person or persons residing or being within this state or any of the United States, or any bank or company, incorporated or unincorporated, within this state or any of the United States, or the president or

any other officer of any such bank or company, then every such person, being lawfully thereof convicted, shall be deemed guilty of felony, and shall suffer death, as a felon, without benefit of clergy."

Two questions here arise under this act: 1. Is it necessary to set out in the indictment that the bank or person intended to be defrauded, is within this state, or some other of the United States? 2. Is the act of 1801 a repeal of the act of 1736-7? and if it is not, are not the third and fifth counts good under it? and the first count under the act of 1801? admitting it to require that the bank to be defrauded should appear, from the indictment, to be in this state, or some other of the United States. In passing upon the first question, I would first remark that on examining Waters' indictment it seems that the learned attorney who drew it alleged that the bank note then forged, was so forged with intent to defraud an incorporated bank within this state, and in another count a person within this state. This is the only precedent to which I have had access, and as that offense had to be covered by the act of 1801, or not be punished capitally, I have no doubt it was so cautiously drawn from the decision in *Houseal's case*, to which I shall presently refer. My brothers Evans and Earle, and Chancellor Johnson, who long filled the office of solicitors, agree that no such particularity was resorted to by them. In *Houseal's case*, 2 Brev. 219, the judges held that "the offenses charged in the indictment, are not pursuant to the act of assembly of 1801, and are not within the scope or intent of that act, because the persons intended to be defrauded are not stated to be within any of the United States." This, I confess, is a decision on the point now before us, although it is not, perhaps, conclusive authority, inasmuch as that point was not necessary to the decision of the cause. That decision out of the way, I should not hesitate to say, that there is no necessity to set out that the bank or person intended to be defrauded, is within the state. It is no portion of the definition of the offense; and when a forgery is charged to be in fraud of a bank, or an individual, it is to be inferred that they are within the state, unless the contrary be alleged. If the proof does not correspond with the indictment, as understood or expressed, the prisoner would be acquitted. But I yield my own judgment to that decision, and it is therefore necessary to inquire whether the act of 1801 is a repeal of the act of 1736-7: Act of 1736-7, sec. 3, P. L. 147.

The latter is more general in the respect in which we are con-

sidering it than the former. It provides, *inter alia*, that "to falsely make, forge, or counterfeit any warrant or order for the payment of money or delivery of goods, with the intention to defraud any person," shall be a felony. By comparing the two acts, it will be found that that part of the act of 1801 which relates to banks and companies, incorporated or unincorporated, is not within the act of 1736-7; and that the act of 1801 is more restricted as to the person to be defrauded than the act of 1736-7. The act of 1801 contains no repealing clause, and can, therefore, only be a repeal of the former act, by implication. This is not favored, and unless there was some contradictory or repugnant provisions, there can not be any implication of repeal. There is nothing of this kind; the two acts may well stand together; the latter applying to its peculiar subject, and the former governing those falling within its provisions. They can not be construed *in pari materia*, for they do not entirely relate to the same subject-matter. This point, however, was expressly adjudged in *Houseal's case*, 2 Brev. 222, and if that case is authority for the precision with which the offense must be laid, under the act of 1801, it must also be for the non-repeal of the act of 1736-7. In it, the judges said, it does not appear to us that these two acts are repugnant or contradictory, or so inconsistent as that they may not well stand together. The latter, to be sure, is more limited and confined in its operation, than the former; but there does not seem to be any necessity for construing this latter so as to operate the repeal of the former; nor would there be any propriety in so doing. The acts of congress of 1790 and 1819, were passed on the same subject (piracy); they differed in some of their provisions; they were both held to be in force; Klintock was adjudged to be within the act of 1790, and Smith within that of 1819: 5 Wheat. 144,¹ 153.² The act of 1736-7 being in force, the third and fifth counts are so framed as to bring the prisoner within its provisions, and, as was ruled in *Houseal's case*, his conviction on those counts must be sustained under it.

The first count, however, charges the forgery to be with intent to defraud the bank of Charleston, South Carolina, and this must be sustained under the act of 1801, or fail. I think, however, that this count is sufficiently framed to be supported under that act. It is sufficient, if it appear to be an incorporated bank within this state. The bank is described by its cor-

1. *United States v. Klintock*.2. *United States v. Smith*.

porate name, the bank of Charleston, South Carolina, which sufficiently shows that it is a bank within this state. It is, too, incorporated by a public act, and we are judicially to take notice and be informed of this fact, and there is, therefore, no necessity for more than the designation of the bank by its name. The first count is therefore sufficient.

The fourth ground contends that the first count is defective, as it alleges the intention to defraud the bank of Charleston, and the tenor of the forged warrant and order for the payment, shows that it was made to defraud the cashier. There is nothing in this ground. The intent of the forged writing is to withdraw the funds of the supposed signer from the bank, and this makes it a fraud intended upon it. The cashier is a mere officer representing the bank, and a paper drawn upon him as such, is drawn upon the bank. If the teller had paid the forged warrant or order in this case, the bank must have lost the credit of so much in a settlement with Mr. Tupper, the supposed drawer. It may be that the bank might have compelled the officer making the payment to refund, and thus replace its loss. Still, this does not prevent the fraud from being of the bank and not the officer.

The fifth ground alleges that the third count is defective, inasmuch as it supposes that it sets out the forged writing as purporting to be of Tristram Tupper, when the tenor shows that it was of T. Tupper. This ground was framed upon the fourth ground, which was sustained as fatal to the indictment, in *Houseal's case*. But unfortunately for the prisoner, his ground here is founded in mistake; the indictment in the third count does not set out the paper writing as purporting to be the warrant and order of Tristram Tupper, but as purporting to be a warrant and order for the payment of money, and then sets it out *in hæc verba*, and avers the prisoner's intention to be to defraud Tristram Tupper. There is no variance here, and the count is well framed.

The sixth ground is a mere variety of the fifth, and was intended to apply to the facts. The jury found that the paper signed T. Tupper, was intended to represent Tristram Tupper, and thus to defraud him, and the proof too well sustains their conclusion.

The seventh ground supposes there was no proof where the warrant and order was made. It is only necessary to read and understand the report to see that here again the prisoner has no just ground of complaint. Two facts were ascertained; it pur-

ports to be made in Charleston, and the prisoner was in Charleston at its date, and had it in possession. These were enough to show where it was made.

The eighth ground supposes there was error in saying to the jury, that if the prisoner was guilty in fact, his conviction might be sustained under the act of 1736-7, the act of 1801, or at common law. There certainly can not be any doubt upon this, as a legal proposition, but as it is questioned, in proof of its accuracy, I will refer to *Houseal's case*, 2 Brev. 219, and to *Foster's case*, 3 McCord, 442.

The prisoner's motion is dismissed.

EVANS, EARLE, and BUTLER, JJ., concurred. GANTT and RECHARDSON, JJ., dissented.

THE DEGREE OF CERTAINTY REQUIRED IN INDICTMENTS is certainty to a common and general intent only, and not certainty in every particular: *Sherburn v. Commonwealth*, 34 Am. Dec. 480, the note to which refers to similar cases hitherto reported in this series; as to what was, at common law, a sufficient indictment for forgery, see *State v. Phelps*, Id. 672, and note.

MITCHELL v. MCBEE.

[1 McMULLAN'S LAW, 267.]

VENDEE WHO ACCEPTS A CONSIGNMENT OF GOODS UPON WHICH THE PRICES ARE MARKED, is presumed to have taken them at the vendor's prices as marked, or as stated in an accompanying invoice, unless it should appear from a custom with which both were acquainted, or from the course of previous dealing between the parties, that the vendee had a right to reduce the prices according to the estimated value of the goods at the place of consignment.

THIS was a proceeding by attachment against Purdy, in which defendant was summoned as garnishee. McBee & Irvin, co-partners, ordered certain goods from Purdy at New York. Soon after the arrival of the goods at their place of destination in South Carolina, Mitchell sued out an attachment against Purdy, a copy of which was served on defendant. McBee & Irvin, having appropriated the goods, wrote to Purdy that some of the goods forwarded were different from what their order to him called for, and that the price charged was too high. Purdy then wrote to Nicol, at Greenville, South Carolina, where defendant resided, to effect a settlement, which Nicol stated could have been done but for the attachment. The issue here is, whether defendant is liable as garnishee for the invoice price of the goods.

There was a verdict for defendant. Plaintiff moved for a new trial.

Choice, for the motion.

B. F. Perry, contra.

By Court, BUTLER, J. In addition to the facts stated in the report, it was admitted in the argument of this case, that defendants were opening the goods when the attachment was served on them. Of course, they then had it in their power to refuse to take such goods as were not ordered, and others charged at higher prices than they were willing to give. Instead of doing this, and giving notice to Purdy of their objection and refusal to accept the goods, they received and appropriated them. Some days afterwards, but when the rights of the parties were fixed under the contract, they wrote to Purdy, intimating their dissatisfaction. By their conduct they made themselves parties to a contest which they might have left with the plaintiffs and Purdy, and have rendered themselves accountable for the value of the goods, under the terms of the contract between themselves and Purdy. They have voluntarily assumed a position which they could well have avoided, for they could have restricted their liability to pay only for the goods which they had ordered, and which they were willing to receive at the prices specified, leaving the others in the hands of the sheriff, to be disposed of under the order and judgment of the court. Having accepted all the goods, the defendants have given to the plaintiffs the power to insist upon and enforce Purdy's rights, whatever they were at the time the goods were received; and it was not in Purdy's power to defeat these rights, by any arrangement which he might choose to enter into, with a view to prejudice the plaintiffs. By the voluntary act of the defendants, the plaintiffs are placed in a situation in which they can insist on their absent debtor's strict legal rights. The question is, what are these rights; by the legal operation of the contract under which the goods were received? The vendor sent them on with their prices specified in the invoice that accompanied them. One party says, in effect, I send you these goods, at the prices mentioned; and if you take them, you know what you have to pay. The other party, the vendee, says, no, although I did not order these particular goods, I will take them, but I will not pay your prices. I will have the goods subject to another valuation, against your consent, and will pay you in Greenville, as much as they are there estimated to be worth. The one insists

on his own prices, perhaps according to valuation in New York, and the other on a *quantum valebat*, to be determined at Greenville, the place of consignment. In an action for goods sold and delivered, where no price was agreed on by the contracting parties, or where the vendor has not put a specific price on them when he sends them to the vendee, the vendor must recover, and *quantum valebat* to be ascertained by evidence on the trial.

But when the price has been agreed on, or where the vendor sends goods with his prices marked upon them, and they are accepted by the vendee, the law will imply that they were taken on the vendor's terms, unless it should appear from the course of previous dealing between the same parties, or from some custom with which both were acquainted, that the defendants had a right to reduce the prices to a *quantum valebat*, at the place where they were received. For in such case the contract might be supposed to have been made in reference to the custom or course of dealing. In the absence of these, the general principles of the law must prevail. It seems to me, that no one should be obliged to part with his property against his consent, except on his own terms; and if the defendants in this case can take these goods and put their own prices on them, or by the estimate of their own witnesses can reduce the prices, the vendor might be compelled to part with his property at prices lower than he was willing to take, and below their true valuation. It is enough to say, that the vendor could not compel the vendees to take the goods against their consent, upon his own terms, and it is reasonable that he should not be deprived of them against his consent upon the terms of the defendants. The case stands thus between the parties: The defendants sent to Purdy for certain goods of a particular description; he sends others not ordered or contracted for, and at higher prices than were implied in the contract, and the defendants receive and appropriate them. Now, what should be law on the subject? I have examined the cases referred to by Mr. Starkie in his second volume on evidence, page 640, and I think he has extracted and laid down the principle correctly: "Where there has been a special contract as to the nature, quality, and price of goods, and those which have been delivered do not correspond with the contract, it is clear the vendee has a right to repudiate goods so delivered *in toto*; for having contracted for one thing, the vendor can not substitute a contract for something else; and therefore, if he return the goods, or give notice to the vendor to take them back, it is clear the vendor can not recover," etc. If, however, the vendee in such cases

choose to keep the goods, he can not reduce the special contract to a mere *quantum valebat*, etc., he must pay the price or return the goods. The question of amendment was within the discretion of the judge below.

In this view of the law, we think a new trial should be granted in this case, which is accordingly ordered.

O'NEALL and EVANS, JJ., concurred.

DIAL v. FARROW.

[1 McMULLAN'S LAW, 292.]

COURT OF LAW MAY VACATE AND SET ASIDE ITS JUDGMENT when founded in fraud, or rendered under circumstances of surprise or mistake such as to entitle the injured party to relief against it.

PRACTICE UPON MOTION TO SET ASIDE A JUDGMENT AT LAW FOR FRAUD, is for the court to cause an order to be entered, after a sufficient showing has been made in support of the motion by appropriate affidavits, requiring the plaintiff to show cause, at an appointed time, why the judgment in his favor should not be set aside and vacated.

MOTION to vacate and set aside a judgment. The application was made upon affidavits stating that the signatures of the applicants to a certain confession of judgment were false and forged, upon which they asked to have the judgment set aside. The motion was denied for want of jurisdiction. Defendants renewed the motion in the appellate court.

Irby, for the motion

Young, *contra*.

By Court, O'NEALL, J. That the court of law has not the power to set aside its own judgments, when founded in fraud, would be a strong proposition. For certainly if the judgment becomes thereby void, and another tribunal could relieve against it, there can be no good reason why the court pronouncing the judgment should not vacate it. Indeed, there is great propriety in a court vacating its own judgment, when it is rendered under such circumstances of mistake, fraud, or surprise, as would entitle the party to relief elsewhere. The case of *Posey v. Underwood*, 1 Hill, 262, states the true rule. The power of setting aside judgments, it remarks, "is exercised as between the parties, on matters out of and beyond the record, as when a judgment has been obtained by duress, by misrepresentation to the defendant, or an abuse of the process of the court." The case made

by the affidavits is, that the confession was not signed by the defendants, Mary Dial and William Henderson. If this be so, the predicate of the judgment is destroyed, and the court had no power to give it, and it is as much a duty to set it aside, as it would be to set aside a judgment where the defendant had not been served with process. I think it is very probable, from the affidavits submitted on the part of the plaintiff, that there is no foundation in fact for the motion to vacate the judgment.

Whether there is or is not, it is perfectly clear that no blame can attach to the plaintiff, for if the defendants have been improperly subjected to the judgment, it has been by the forgery of their co-defendant, G. C. Dial, committed with a view to defraud the plaintiff. The collision between the affidavits makes it necessary that the case should pursue the only course by which truth can be elicited—a trial by jury. The proper course would have been, on the showing of the defendants, to have granted a rule against the plaintiff, returnable to the next term, to show cause why the judgment should not be set aside, and to have directed that the affidavits submitted by the defendants should be filed. To them the plaintiff would have answered by filing counter-affidavits. But as affidavits on both sides have been submitted, and the conflict in fact is apparent, the order will be made at once, which the circuit judge might have made. The motion to reverse the decision below is granted. The affidavits submitted by the defendants and plaintiff, are ordered to be filed in the clerk's office of Laurens district, and the defendants have leave to file their suggestion to set aside the judgment of *Patillo Farrow v. G. C. Dial, Mary Dial, and William Henderson*, on entering into a consent rule to pay to the plaintiff all costs which he may incur thereby, if they should fail in setting aside the said judgment; and the said plaintiff is ordered to plead to the said suggestion so to be filed. The defendants to be the actors in the said suggestion.

The whole court concurred.

JUDGMENT OBTAINED BY FRAUD OR SURPRISE WILL BE SET ASIDE: *Bisess v. Barker*, 23 Am. Dec. 720.

MURRAY v. S. C. RAILROAD COMPANY.

[1 McMULLAN'S LAW, 385.]

SERVANT CAN NOT RECOVER OF EMPLOYER for injuries occasioned by the negligence or misconduct of a fellow-servant. *O'Neill and Gantt, JJ.*, and *Johnston, Ch.*, dissenting.

CASE. Plaintiff was engaged as a fireman on a locomotive used and employed by defendants on their railroad. The injuries out of which this action arose were received by the plaintiff, while engaged in the discharge of his duties as fireman, by reason of the engine on which he was employed being thrown from the track, in consequence of the negligent and careless conduct of the engineer, who had charge of the engine, and who refused and neglected to lessen the speed or to stop the engine, after his attention had been called to the obstacle on the track which occasioned the accident. Verdict for plaintiff. Defendant moved for a new trial.

Blanding, for the motion.

By Court, EVANS, J. In the consideration of the question involved in this case, I shall assume that the verdict establishes the fact that the plaintiff's injury was the effect of the negligence of the engineer, and then the question arises whether the railroad company is liable to one servant for an injury arising from the negligence of another servant. The business of the company is the transportation of goods and passengers. Its liability in these respects, is, in general, well defined and understood by the profession; and if the plaintiff's case came within any of the principles applicable to these cases, we should have no difficulty in deciding it. The application of steam power to transportation on railroads, is of recent origin, but the principle by which the liability of a carrier is fixed and ascertained, is as old as the law itself. There is nothing in the fact, that the defendant is a corporation, except that of necessity it must act altogether by agents. The liability is precisely the same as if the defendant was an individual acting by the agency of others. The principle is the same, whether you apply it to a railroad, a steamboat, a wagon, a stage-coach, or a ship. If this plaintiff is entitled to recover, I can see no reason why the owner of any of the above modes of conveyance, should not be liable under the same circumstances. If the owner of a wagon should employ two men, one to drive and the other to load, and either of them should so negligently perform his work as to injure the other, the owner of the wagon would be liable. The principle will extend to all the vocations of life wherein more than one person is employed to effect a single object; and a new class of liabilities would arise, which I do not think has ever heretofore been supposed to exist. It is admitted, no case like the present has been found, nor is there any precedent suited to the plaintiff's case, unless he stands in

the relation of a passenger to the company. In this point of view, his counsel has chosen to regard him, for I understand the declaration alleges he was a passenger. Now, a passenger is everywhere spoken of, as one who pays for transportation. In all the operations necessary for this, he is passive. The moment he becomes an operator, for then his character is changed, he becomes the servant of the company, and not its passenger. It would be a confusion of terms so to regard him. He is no more a passenger than a sailor or a stage-driver. There is nothing in the definition of bailment, or the classification of the different kinds of liability growing out of that relation, which applies to the plaintiff's case, and if he is entitled to recover, it must be on principles which apply equally to all operations of life in which agents are employed.

There is no question that, in general, the principal is liable for the acts of the agent, performed in the execution of his agency, or in and about the business of his principal. Thus, the owners of a railroad would be liable to passengers for an injury sustained by the negligence of any of its servants, superior or subordinate, because it is implied in the undertaking to carry, not only that the road and cars are good, but that the servants employed are competent and will perform their duty. For the loss of goods, the law annexes a still greater responsibility. So, also, if one employ an agent to execute any work whereby an injury may result to a stranger, the law requires it to be done with care, and if a stranger sustain an injury, his principal is liable, as was decided in *O'Connell v. Strong*, Dud. 265. But the plaintiff is neither a passenger nor a stranger, and if he can recover, it must be in his hermaphrodite character as a passenger-fireman. In the cases above enumerated, the principal is represented by the agent, and unless he be liable, the great operations of life can not be carried on—no man would have adequate security for his person or his property. The owner of goods would not trust them on a railroad, or a steamboat, if his only security was the liability of the mere servants employed. No passenger would commit his safety to a railroad, steamboat, or stage-coach, if, in case of injury, he could look to none but the agents usually employed about these modes of transportation. So, also, no man would have any guaranty for the security of his property, if his only remedy for negligence was the irresponsible or insolvent agents which another might employ. In all these, and similar cases, the reasons of the liability of the principal are clear, and the law books are full of cases or pre-

cedents which apply to them; but it is not so with the plaintiff's case; there is neither authority nor precedent for it.

It was said in the argument that if the engineer had been the owner of the road he would have been liable. Of this I apprehend there would have been no doubt, but then his liability would have arisen, not from his being the owner, but because the injury arose from his own act. That he is now liable seems to me to admit of no doubt. But it by no means follows as a consequence that because he is liable those who employ him are liable also. One acting as agent may subject himself to liability in a variety of cases for which his principal would not be liable; and this may be as well in cases of contract as in cases of tort. The extent of the liability of the principal for the acts of the agent can, in general, be readily ascertained from the object of the contract and the relative position of the parties. A passenger desires to be transported from one place to another; the carrier undertakes to do this, and is liable if he fails. It is wholly immaterial by whose default the injury resulted. There has been a breach of the contract, and he has a right to look to him with whom his contract was made. With the plaintiff the defendants contracted to pay hire for his services. Is it incident to this contract that the company should guarantee him against the negligence of his co-servants? It is admitted he takes upon himself the ordinary risks of his vocation; why not the extraordinary ones? Neither are within his contract—and I can see no reason for adding this to the already known and acknowledged liability of a carrier, without a single case or precedent to sustain it. The engineer no more represents the company than the plaintiff. Each in his several department represents his principal. The regular movement of the train of cars to its destination is the result of the ordinary performance by each of his several duties. If the fireman neglects his part the engine stands still for want of steam; if the engineer neglects his, everything runs to riot and disaster. It seems to me, it is, on the part of the several agents, a joint undertaking, where each one stipulates for the performance of his several part. They are not liable to the company for the conduct of each other, nor is the company liable to one for the misconduct of another; and, as a general rule, I would say, that where there was no fault in the owner, he would be liable only for wages to his servants; and so far has this doctrine been carried, that in the case of seamen, even wages are forfeited if the vessel be lost and no freight earned.

In the above observations, I have endeavored to confine myself strictly to the case before the court. It is not intended to prejudice other questions, which may arise between the company and its servants; nor do I mean to say, that a case may not occur, where the owner, whether an individual or company, will be liable for the acts of one agent to another; but then it must be in such cases as where the owner employs unfit and improper persons as agents, by whose ignorance or folly another is injured. Upon such a case, it will be time enough to express an opinion when it arises. The present is not such a case. The engineer, according to the evidence, was competent, though he may have been rash in the particular instance in which the plaintiff's injury was sustained. He was known to the plaintiff as well as to the company, for it appears by the report that he selected the engineer under whom he was willing or prepared to serve. It seems to me the plaintiff is not, therefore, entitled to retain his verdict, and a motion for a new trial is granted.

RICHARDSON, EARLE, BUTLER, HARPER, and DUNKIN, JJ. and OC., concurred.

JOHNSON, Chancellor. I concur in this opinion, and will only add a word in illustration of my own views of the question. The foundation of all legal liability, is the omission to do some act which the law commands, the commission of some act which the law prohibits, or the violation of some contract, by which the party is injured. There is no law regulating the relative duties of the owners of a steam car, and the persons employed by them to conduct it. The liability, if any attaches, must therefore arise out of contract. What was the contract between these parties? The plaintiff, in consideration that the defendants would pay him so much money, undertook to perform the service of fireman on the train. This is all that is expressed. Is there anything more implied? Assuming that the injury done, was in consequence of the negligence of the engineer, the defendants would not be liable, unless they undertook to answer for his diligence and skill. Is that implied? I think not. The law never implies an obligation in relation to a matter about which the parties are or may, with proper diligence, be equally informed. No one will ever be presumed to undertake for that which a common observer would at once know was not true. The common case of the warranty of the soundness of a horse, notoriously blind, may be put in illustration. The warranty does not extend to the goodness of the eyes, because the

purchaser knew, or might have known, with proper care, that they were defective.

Now, the plaintiff knew that he was not to conduct the train alone. He knew that he was to be placed under the control of the engineer. He knew that the employment in which he was engaged was perilous, and that its success was dependent on the common efforts of all the hands; and, with proper diligence and prudence, he might have been as well, and it does not follow that he might not have been better, informed than the defendants, about the fitness and security of all the appointments connected with the train. If he was not, it was his own want of prudence, for which defendants are not responsible. If he was, he will be presumed to have undertaken to meet all the perils incident to the employment.

There is not the least analogy between this case and that of common carriers of goods or transporters of persons. They are liable in respect to the price paid. Not so here. The plaintiff paid nothing for his transportation; on the contrary, he was to be paid for his labor, and for the perils to which he was exposed, as incident to his employment. No prudent man would engage in any perilous employment, unless seduced by greater wages than he could earn in a pursuit unattended by any unusual danger.

O'NEALL, J., dissenting. This case was tried by myself, and although, had I been on the jury, I should have found for the defendants, yet there were certainly facts in the evidence, which might have led another to a different conclusion; and, therefore, I am not disposed to disturb the verdict. This makes it necessary to consider the legal doctrine which I laid down to the jury. In substance, I held, that if the injury to the plaintiff resulted from the negligence of the engineer, then the plaintiff was entitled to recover. This doctrine, a large majority of my brethren think erroneous, and however much deference is due to their opinions, yet, as I consider them to be wrong, I think it my duty to state my own views.

This case is one of the first arising out of the conveyance of human beings by locomotives on railroads. It goes beyond the ordinary case of a passenger, and presents a claim on the part of a hired servant, against his employers, for an injury sustained in their service. If it arose out of any of the old-fashioned modes of conveyance, managed by the defendants themselves, could there be a doubt that they would be liable, if the injury resulted from negligence? Take the case of a stage-coach,

driven by the owner, and let it be supposed that the plaintiff was hired as a guard, and that he was injured in that employment, by the careless driving of the defendant, who would hesitate to say that he was entitled to recover? No one who had a proper regard to legal principles. Is there any distinction in law as to the effect which the employment of the plaintiff is to have, in the different kinds of service in which he may engage? I think there is none. If Mr. Tupper, the able and efficient officer of the company, had, in person, managed the engine, and the plaintiff had been injured by his carelessness, I would most respectfully ask, how could it be pretended that the company was not liable? I admit here, once and for all, that the plaintiff, like any other servant, took, as consequence of his contract, the usual and ordinary risks of his employment. What is meant by this? No more than that he could not claim for an injury, against which the ordinary prudence of his employers, their agents, or himself, could provide. Whenever negligence is made out as the cause of injury, it does not result from the ordinary risks of employment.

How far are the defendants liable for the acts of the engineer? In the language used in Bacon's Abridgement, tit. Master and Servant, letter B, "it is highly reasonable that they should answer for such substitute, at least *civiliter*; and that his acts, being pursuant to the authority given him, should be deemed the acts of the master." Now to this authority, it will not do to say the defendants did not authorize the engineer to run his engine so carelessly as to injure the plaintiff. They put him in command of it, and authorized him with it to run the road. If, in the doing of this act, which is according to their authority, he acts negligently, then they are liable for the consequences, for they result from the doing of their business, by one then employed by them. The cases of *Drayton* ads. *Moore* and *Parker & Co. v. Gordon*, Dudley, 268, and of *O'Connell v. Strong*, Id. 265, are full to this point. In ordinary cases, this would not be questioned. But it is supposed that this case is not governed by the ordinary rules applicable to cases of liability, arising out of the relation of master and servant. I am at a loss to conceive any just reason for this notion. The law, it seems to me, is to be regarded as a general science, applicable to every case coming within the letter or the reason of the rule. Where it is within neither, it becomes an exception to it. It is only necessary to state this case, to see that it is within both the letter and reason of the rule; for the defendants

employ the plaintiff to act under the command of another of their servants. In such a case, the servant in command is in the place of the employers. When they hire another to engage in a service, where neither his own care nor prudence can shield him from injury, which may arise from the act of another of their agents, having the control of him, the question of their liability depends upon the care used by such superior agent. The ordinary rule in cases of hiring goods, is, that the hirer should use that degree of care which a prudent man would take of his own goods. If this degree of care is shown, then the hirer is not liable for any injury which may result to the goods hired. This rule, it seems to me, must, necessarily, be that which applies to this case. Is more favor to be bestowed on a man's goods than on his person? It would be strange that this should be so. It may be tested, however, by inquiring if the plaintiff, instead of himself, had hired his negro man to the defendants as second fireman, and he had lost his leg by the carelessness of the engineer, would not the defendants have been liable? It seems to me that they would, or one section of the law of bailments would be repealed by the court of errors. There can be no difference in the law, as applicable to the white man or the slave, in a contract of hiring. Both are capable of self-preservation, and both are capable of wrong and right action; and in the capacity of firemen, both are under the orders of the engineer, and must look to him for safety.

In the cases of *Drayton* ads. *Moore*, and *Parker & Co. v. Gordon*, Dud. 272, it was said, "When a master employs slaves in any public employment or trust, such as tradesmen, ferrymen, wagoners, patroons of boats, or masters of vessels in the coasting or river navigation, he undertakes, not only for their skill and faithfulness to all who may employ them, but also, for their general skill and faithfulness to the whole community." This rule stated as to slaves, applies more forcibly to hired servants, and my brother Johnson, who then resisted the rule as to slaves, admitted it in its fullest extent as to hired servants. Taking this as settled law, how stood the plaintiff in his contract with the defendants in relation to the engineer? Had he not the right, according to law, to regard the defendants as contracting both for his skillfulness and faithfulness? It seems to me, there can be no doubt about it. Well, this being so, if the engineer was negligent, the defendant's undertaking for his faithfulness was broken, and they are most clearly liable.

It is, however, urged (and that is, as I understand, the ground

on which the court of errors decides the case) that this case is one of novel impression, and not to be decided by the ordinary rules of the law of bailment. Conveyance by locomotives on railways is supposed to be more analogous to shipping than anything else; and hence, unless a sailor could recover for an injury arising from the neglect of the master, it is supposed that a fireman can not, for an injury arising from the neglect of the engineer. Before I discuss the case in this new aspect, I deny that any mode of conveyance on land is to be put on a footing with the navigation of the ocean in ships. That is governed by principles of law coeval with society, and in many respects common to every civilized nation of the earth. Conveyances on land are also regulated by a very ancient and well-settled law, wholly distinct from the other. It will, however, be sufficient to show by one plain view, that the law applicable to mariners can not affect this case. Unless a vessel earns freight, the mariner is entitled to no wages. Suppose a locomotive running from Charleston to Aiken should burn up the entire train, and thus earn no freight, would not all the hands hired by the defendants to manage her, be entitled to their wages? There could be no more doubt that they would, than that a man hired to drive my wagon to Charleston, who, by some unforeseen accident, should lose his load, would still be entitled to his wages. This shows that in the very beginning there is such a difference in the law of a ship and that of a locomotive, that it is impossible the law of the former can decide the right of a servant employed in the latter, to recover for an injury arising from the neglect of the engineer.

But if it were otherwise, and this case depended upon maritime law, still I am inclined to think the plaintiff ought to recover. No exactly analogous case can be found. In Phillips on Insurance, 463, Judge Story is represented as saying, in the case of *The Saratoga*: "It appears to me, that upon the established doctrine of our law, where the freight is lost by inevitable accident, the seamen can not recover wages, as such, from the ship owner." I concede that this dictum is the true law regulating a mariner's right to wages. If the freight was lost by the master's neglect, it could not then be ascribed to inevitable accident; and then, I think, the seaman would be entitled to recover. If this is true in relation to wages, the same rule must hold as to the mariner's right to recover for any injury arising from the negligence of the master.

But it is said, it would be impolitic to make the defendants

liable for any injury accruing to a fireman, from the neglect of the engineer. This would be worth inquiring into with great care in the legislature; but, in a court, I think we have nothing to do with the policy of a case; the law of it is our guide. But if we are to look to the policy, then I should argue that the more liability imposed on the railroad company, the more care and prudence would be thereby elicited. This result is what the community desires. For it secures life and property committed to their care.

I think the motion ought to be dismissed.

GANTT, J., concurred.

J. JOHNSTON, Chancellor, also dissenting. It may not diminish the force of the observations made by Mr. Justice O'Neill, if I state very briefly the reasons which induce me to concur in his dissent. It is admitted that the duties and liabilities between masters and hired servants, result only from the nature and terms of the contract which forms the relation; and that neither party is allowed to extend or abridge the contract. That the master can not exact other services than those stipulated for; nor, by any indirection, subject the servant to any other than the ordinary perils incident to the employment; and that if he does by any agency whatever, or by any means, whether of design or negligence, accumulate upon the servant, while in the performance of his duty, any dangers beyond those inherent in the service itself, they fall upon the latter, not as a servant (for his contract does not bind him to endure them), but as a man, and the law entitles him to redress.

It is also admitted that these principles are not confined to cases where one servant only is employed, but prevail when a plurality are at the same time engaged by the same master. Their application, however, in cases of the latter description, depends upon the terms of the contract. If several jointly contract to perform a specified duty, the master is not liable to either of them for injuries resulting from the faithlessness or negligence of his coadjutor; all of them being, substantially, agents for each other, to perform their joint undertaking. But when their engagements are several, each undertaking for himself, to perform distinct offices, in a matter susceptible of a division of labor, each stands to the master in the same relation, and is entitled to the same rights, as if he was the only servant employed. The master is responsible to him, as he would be to a stranger, for the misconduct of the others, who

are exclusively his, the master's, agents. Now, this is admitted to be the general law upon the subject; and it is applicable to the servants of a railroad company, as well as to those of any other employer, unless there be something to take them out of its operation. No instance of master and servant has been pointed out where these principles do not obtain, except the case of a ship's crew; but that stands clearly upon special grounds of usage. If the servants employed about a railroad, are excepted out of the general rules relating to agency, the exception, with the grounds and reasons of it, must be shown, otherwise the employers will be as liable to any one engaged in their service, for injuries inflicted on him by other agents, in the course of their employment, as a planter would be to a hired hand for maltreatment by his overseer.

I presume no one will contend that the rule applicable to service in a railroad company is, that the company is not liable to any agent, for any injury, provided the company can only show that another of its agents has inflicted it. Would it do to say, for example—and upon what principle could it be said—that a superintendent of the hands engaged in repairing the road, may, with impunity to the company, abuse his authority to the injury of their health? Or, if the cars were to be run at night, and, through the neglect of hands set apart to watch the road, and remove obstructions, the whole train were lost, and any officer or hand on board were crippled, certainly no one means to assert that none of these could claim compensation from the company, but must look exclusively to the irresponsible agents (perhaps slaves), hired by the company, through whom the injury accrued. And yet, how is a rule to be laid down—I wish to hear the rule stated—which would include that case and exclude this? The fidelity of the hands detailed to superintend the road, in the case I have supposed, would be as essential to the common enterprise of running the cars, as the fidelity of the hands on board to their respective duties. If the idea is indulged, that there is, in any branch of this enterprise, an implied undertaking among the servants to do the work jointly, and to waive the neglect of each other, what will constitute such an understanding? Where are its limits? Does it arise from the intimate connection of the hands? Then, I wish to be informed what degree of intimacy, what strength of association, is demanded, to raise the implication? Where is the line?

I give no opinion upon the evidence. I take the verdict for

the facts; and, according to the finding of the jury, the plaintiff faithfully performed his particular duty, and, while performing it, was injured by the faithlessness or negligence with which the company, acting in the person of another agent, executed a duty incumbent upon them. Ought the plaintiff's remedy to be doubtful?

The elements of the contract between him and the defendants, are these: on their part, so far as they were to contribute to the propelling of the cars, that they would carry him safely; and, on his part, that on the trip he would perform certain offices. With respect to the last, he was their servant; with regard to the first, he was their passenger; and as their passenger they have crippled him. The distinction is plain, and the propriety of applying it would be as plain, if instead of being stationed where he was, he had only been a clerk, hired by the company, to travel up and down in the cars, and take a minute of their operations. Yet, on principle, no discrimination can be drawn against him on account of his being a fireman, and not traveling clerk; because he had as little connection with, or control over, the department from which his injury sprang, or the agent to whom it was exclusively committed by the defendants, as if he had been assigned any imaginable duty in the remotest part of the train.

EMPLOYER'S LIABILITY TO SERVANT FOR INJURIES TO THE LATTER RESULTING FROM NEGLIGENCE OR MISCONDUCT OF FELLOW-SERVANT.—At the present day no general principle of law is more firmly established than that a master or employer is not responsible to those engaged in his employment, for injuries suffered by them as the result of the negligence, carelessness, or misconduct of other servants of the same employer, engaged in the same common or general service or employment, unless the employer himself has been at fault: *Farwell v. Boston and Worcester R. R. Co.*, 4 Metc. 49; *Brown v. Maxwell*, 6 Hill, 592; *Coon v. Syracuse and Utica R. R. Co.*, 1 Seld. 492; *Russell v. Hudson R. R. Co.*, 17 N. Y. 134; *Boldt v. N. Y. C. R. R. Co.*, 18 Id. 432; *Hayes v. Western R. R. Co.*, 3 Cush. 270; *Hutchinson v. York N. & B. R'y Co.*, 5 Exch. 343; *Wright v. N. Y. C. R. R. Co.*, 25 N. Y. 562; *Faulkner v. Erie R. Co.*, 49 Barb. 324; *Alabama and Fla. R. R. Co. v. Waller*, 48 Ala. 459; *Carle v. Bangor and Piscataquis C. & R. R. Co.*, 43 Me. 269; *Bartonshill Coal Co. v. Reid*, 3 Macq. 266; *Bartonshill Coal Co. v. McGuire*, Id. 300; *Chicago and Alton R. R. Co. v. Murphy*, 53 Ill. 336; S. C., 5 Am. Rep. 48; *Hoemer v. Ill. Cent. R. R. Co.*, 15 Id. 550; *Moseley v. Chamberlain*, 18 Wisc. 700; *Zeigler v. Day*, 123 Mass. 152; *Wood v. New Bedford Coal Co.*, 121 Id. 252; *Keilley v. Belcher S. M. Co.*, 3 Sawyer, 500; *Hogan v. C. P. R. R.*, 49 Cal. 128; *Sullivan v. Mississippi and Mo. R. R. Co.*, 11 Iowa, 421; *Treadwell v. Mayor*, 1 Daly, 123; *McDermott v. Pacific R. R. Co.*, 30 Mo. 115; *Madison and Indianapolis R. R. Co. v. Bacon*, 6 Ind. 205; *Hard v. Vermont and Canada R. R. Co.*, 32 Vt. 473; *Ponton v. R. R. Co.*, 6 Jones, 245; *Moss v. Johnson*, 22 Ill. 633; *Wigget v. Fox*, 36 Eng. L. and Eq. 486; *Ryan v. Cumberland Valley R. R. Co.*, 23 Pa. St. 384;

Whealan v. Mad River and L. E. R. R. Co., 8 Ohio St. 249; *Wondor v. Baltimore and Ohio R. R. Co.*, 32 Md. 411; S. C., 3 Am. Rep. 143; *Gibson v. Pacific R. R. Co.*, 46 Mo. 163; S. C., 2 Am. Rep. 497; *Cooper v. Milwaukee & P. R. W. Co.*, 23 Wis. 668; *Fox v. Sandford*, 4 Sneed, 36; *McMahon v. Davidson*, 12 Minn. 357; *Searle v. Lindsay*, 11 C. B. (N. S.) 429; *Thayer v. St. Louis, Alton, and T. R. R. Co.*, 22 Ind. 26; *Yeomans v. Contra Costa S. N. Co.*, 44 Cal. 71; *Jones v. Granite Mills*, 126 Mass. 84; *Murphy v. Boston and Albany R. R. Co.*, 59 How. Pr. 197; *Peterson v. Whitebreast O. & M. Co.*, 50 Iowa, 673; S. C., 32 Am. Rep. 143; *Potts v. Port Carlisle D. & R. W. Co.*, 2 L. T. (N. S.) 283; *Smith v. Lowell Mfg. Co.*, 124 Mass. 114; *McDonald v. Hazeltine*, 53 Cal. 35; *Michigan Cent. R. R. Co. v. Dolan*, 32 Mich. 510.

THE ORIGIN OF THE RULE above stated, which has since become so firmly interwoven with the fabric of the common law, wherever that system prevails, is attributable, so far as our researches have enabled us to discover its source, to the opinion delivered by Judge Evans in the principal case. It was followed soon after in Massachusetts, in the case of *Furwell v. Boston and Worcester R. R. Co.*, 4 Metc. 49, in which the opinion of the court was pronounced by Shaw, C. J.; and so ably were the principles of reason and of law applicable to the case, stated, enlarged upon, reasoned, and explained, that the opinion in that case has since been declared to be one of the most profound and masterly that ever emanated from the pen of that distinguished jurist. It has commanded the admiration and elicited the encomiums of judges and text-writers alike, and has been cited and approved by the courts of justice of two continents. The learning, ability, and reputation of Chief Justice Shaw, and the surpassing strength and force of his deductions in that case, together with the circumstance that it was a very early one involving this principle, have rather overshadowed the opinion of Judge Evans in *Murray v. S. C. R. R. Co.*, and the Massachusetts case, though of later date, has attained the dignity of a leading case upon this subject, and has, by some writers, been regarded, although erroneously, as being the first case in which the doctrine was declared. The marvelous progress which has since given rise to the use of mechanical appliances which render the employment of persons engaged in their management more hazardous, the increased use of machinery in manufacturing and other enterprises, and particularly the perils and dangers which attend the operation of railroads by servants engaged thereupon, have contributed to render this principle a most important and useful one, which courts are very frequently called upon to adopt in cases where relief is asked. It is proper to refer, also, in tracing the history of this principle, to the judgment of Lord Abinger, delivered in 1837, in *Priestly v. Fowler*, 3 Mee. & W. 1, in which it was held that a servant could not recover of his master for injuries caused by the breaking down of a van, driven by a co-servant, upon which the former was riding, and which had been overloaded, with defendant's knowledge, the servants being then engaged in delivering defendant's goods.

THE REASON OF THE RULE can not be better stated than by referring to the opinion delivered by Shaw, C. J., in the case above mentioned: *Furwell v. Boston and Worcester R. R.*, *supra*. "The general rule," said the learned chief justice, "resulting from considerations as well of justice as of policy, is, that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal presumption the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the

carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any others. To say that the master shall be responsible because the damage is caused by his agents, is assuming the very point which remains to be proved. They are his agents to some extent and for some purposes, but whether he is responsible, in a particular case, for their negligence, is not decided by the single fact that they are, for some purposes, his agents. In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned. We are of opinion that there are such considerations which apply strongly to the case under discussion. Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends to a great extent on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service, if the common employer will not take such precautions, and employ such agents, as the safety of the whole party may require. By these means, the safety of each will be much more effectually secured, than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other. Regarding it in this light, it is the ordinary case of one sustaining an injury in the course of his employment, in which he must bear the loss himself, or seek his remedy, if he have any, against the actual wrong-doer." This case arose out of injuries received by an engineer, while running a train of cars, in consequence of the carelessness of another servant of the company in the management of a switch.

THE SERVANT IS PRESUMED TO BE ACQUAINTED WITH THE RISKS, PERILS, AND HAZARDS OF THE BUSINESS which he undertakes to perform, and among them such risks as are incident to the negligent, careless, or wrongful acts of other servants, engaged with him, in the same general employment. In a very recent English case this principle was stated as follows: "When a servant enters into the service of a master, he tacitly agrees to take upon himself to bear all the ordinary risks which are incident to his employment, and among others the possibility of injury happening to him from the negligent acts of his fellow-workmen:" *Lovell v. Howell*, 1 L. R., C. P. Div. 167. So a brakeman upon a railroad, whose duty it is not to apply the brakes except when directed by the engineer or conductor, can not maintain an action against their common employer for an injury resulting from the culpable rate of speed at which the engineer and conductor ran the train: *Sherman v. Rochester and Syracuse R. R. Co.*, 17 N. Y. 154; nor is a railroad company liable to an employee for an injury occasioned by the falling of a bridge, the company having no notice of the defect, which was not an apparent one, and having employed skillful and competent persons to supervise and inspect its road-bed and bridges: *Warner v. Erie R. Co.*, 39 N. Y. 468; *McDermott v. Pacific R. Co.*, 30 Mo. 115; nor for injuries resulting from the difference in time kept by a person in their employ and a conductor of a train, in consequence of which, workmen engaged in repairing the road, were told by a foreman that they had sufficient time to reach a certain point on the road on a hand-car before an expected train could overtake them, and, the foreman's watch being slower than the conductor's, the train struck the car and killed the servant:

Weger v. Pennsylvania R. R. Co., 55 Pa. St. 400; and where an injury was caused to a brakeman by the negligence of his fellow-servant, and the injury would not have happened if the latter had performed his duty, it is immaterial that the train was short of hands: *Hayes v. Western R. R. Co.*, 3 Cush. 270. So an actor can not recover for injuries caused by a fall through an unguarded opening in the stage which was insufficiently lighted: *Seymour v. Maddox*, 5 Eng. L. and Eq. 265; the fact that the injured servant was a minor does not affect his legal rights: *King v. Boston and Worcester R. R. Co.*, 9 Cush. 112; *R. R. Co. v. Miller*, 51 Tex. 270; *Garland v. Toledo etc. R. R.*, 67 Ill. 498. It is a question of fact in such a case, which is proper to be considered by a jury, whether at his age he had sufficient understanding to know the hazards of his employment, so as to bring him within the general rule: *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548. The doctrine that an action will not lie by a servant against his principal for an injury sustained through the default of a fellow-servant, applies to those cases only where the injuries complained of occur without fault of the principal, either in the act which caused the injury, or the employment of the servant who caused it. Thus, an employee of a railroad company is not bound to know whether the road has been properly and safely constructed; that it has been, is the implied undertaking of the company with its servants, and they enter its service in that faith and that it will be kept in safe repair: *Chicago & N. W. R. R. Co. v. Swett*, 45 Ill. 197; *Porter v. Hannibal and St. Jo R. R. Co.*, 60 Mo. 100. In all cases of this character the important inquiry must be, whether the negligence complained of may, in any manner, be attributed to the employer. If the negligence was the personal default or omission of the servant alone, by whose act the injury was caused, no dereliction can be imputed to the master, and the latter will not be liable; if, however, he has himself been at fault, in employing a servant who was notoriously careless, unskillful, or incompetent to perform, in a proper manner, the duties intrusted to him, the principle would be otherwise, for the rule was never intended to shield him from the consequences of his individual negligence.

THE GENERAL RULE IN RESPECT TO THE RIGHT OF A SERVANT TO RECOVER OF HIS MASTER for injuries occasioned by the negligence of his co-employee, is thus formulated by Mr. Cooley: "The master is not responsible to one person in his employ for an injury occasioned by the negligence of another in the same service, unless generally, or in respect to the particular duty then resting upon the negligent employee, the latter so far occupied the position of his principal, as to render the principal chargeable for his negligence as for personal fault:" Cooley on Torts, 564. "The only ground," said the court in *Warner v. Erie R. Co.*, 39 N. Y. 468, "of liability of a master to an employee, for injuries resulting from the carelessness of a co-employee, which the law recognizes, is that which arises from personal negligence, or from want of proper care and prudence in the management of his affairs, or the selection of his agents, or machinery, and appliances." And again, it was held in an action by a servant against his master to recover for injuries resulting from the negligence of a co-employee, that the sole question was whether the defendant was guilty of negligence in employing an incompetent person; it was unnecessary to inquire whether the fellow-servant was negligent: *Haskin v. N. Y. C. R. R. Co.*, 65 Barb. 129. The authorities all state the rule with the qualification before referred to, that the injury must be attributable in some manner to the want of ordinary care on the part of the master in order to sustain a recovery against him. If the ground of the action is the unskillfulness of the servant, it must be shown in addi-

tion, that the injuries complained of were the result of such unskillfulness. The principles upon which the master's exemption from liability is founded, are forcibly and succinctly stated by Allen, J., in *Wright v. N. Y. C. R. R. Co.*, 25 N. Y. 562. This was an action by a brakeman, employed on one of defendant's trains, for damages resulting from a collision with another train of the same company, alleged to have been due to the negligence of defendant in employing an incompetent engineer. The evidence showed that the engineer complained of was ordinarily competent, and it was therefore held, that the defendant not having been negligent in the matter of his employment, there could be no recovery, because the plaintiff had voluntarily assumed the risks of his employment, and must therefore bear the loss consequent upon them. The court in that case said:

"Certain principles touching the liability of the master to the servant, for injuries sustained by the latter in the course of his employment, have, by the decisions in this state and several of the sister states, as well as in England, become so well settled that they need only to be stated. 1. A master is not responsible to those in his employ for injuries resulting from the negligence, carelessness, or misconduct of a fellow-servant engaged in the same general business. 2. The rule exempting the master is the same, although the grades of servants or employees are different, and the person injured is inferior in rank and subject to the directions and general control of him by whose act the injury is caused. 3. Neither is it necessary, in order to bring a case within the general rule of exemption, that the servants, the one that suffers and the one that causes the injury, should be at the time engaged in the same operation or particular work. It is enough that they are in the employment of the same master, engaged in the same common enterprise, both employed to perform duties and services tending to accomplish the same general purpose, as in maintaining and operating a railroad, operating a factory, working a mine, or erecting a building. 4. The master is liable to his servant for any injury happening to him from the misconduct or personal negligence of the master, and this negligence may consist in the employment of unfit and incompetent servants and agents, or in furnishing for the work to be done, or for the use of the servant, machinery or other implements and facilities improper and unsafe for the purposes to which they are to be applied. The employer does not undertake with each or any of his employees for the skill and competency of the other employees engaged in and about the same service, or for the sufficiency and safety of the materials and implements furnished for the work, or for the convenience or comfort of the laborer, since neglect and want of due care in the selection and employment of the agent or servant through whose want of skill or competency an injury is caused to a fellow-servant, must be shown in order to charge the master; and if the injury arises from a defect or insufficiency in the machinery or implements furnished to the servant by the master, knowledge of the defect or insufficiency must be brought home to the master, or proof given that he was ignorant of the same, through his own negligence and want of proper care; in other words, it must be shown, that he either knew or ought to have known the defects which caused the injury. Personal negligence is the gist of the action. It is not enough that the foreman and general superintendent of the work is guilty of negligence, causing injury to the subordinates. 5. If the servant sustaining an injury through the unskillfulness or insufficiency in numbers or otherwise of his fellow-laborers, or defects in the machinery or conveniences furnished by his employer, has the same knowledge or means of knowledge of the unskillfulness and deficiencies referred to, as his employer, he can not sustain an action for the injury, but will be held to have voluntarily assumed all the risks of the employment, incurred, as they were, by the want

of skill and incompetency of those employed with him, or the defective machinery used in the work. 6. It is not sufficient to charge the master for injuries to his servant, that others of his employees were unskillful or incompetent, or the machinery unsafe and unfit for the purposes, unless the injury complained of resulted from these causes. If it was occasioned, notwithstanding such defects, by the negligence of a fellow-servant, the master is not responsible."

DEGREE OF CARE WHICH MASTER IS BOUND TO EXERCISE.—The gist of an action against a master by his servant to recover for injuries caused by the negligence, or, as it would be more proper to say, incompetence of a fellow-servant, being the personal negligence of the master, it becomes important to inquire what the particular duty of the master toward his servant in relation to the employment of other servants engaged in the same business is, and what degree of care and diligence in that respect the master is required to exercise. In order to exempt himself from liability to a servant for the consequences of a fellow-servant's negligent or careless act, the master is required to use ordinary diligence only in the employment of servants, and no more. If he has exercised due care in the selection of his servants, and on account of the carelessness of the latter an injury is caused to another in the same employment, the master is not liable. The obligation of the master does not extend beyond the use of ordinary care and diligence: *King v. Boston and Worcester R. R. Co.*, 9 Cush. 112; *Caldwell v. Brown*, 53 Pa. St. 453; *Ponton v. R. R. Co.*, 6 Jones, 245; *Manville v. Cleveland and Toledo R. R. Co.*, 11 Ohio St. 417; *Wiggett v. Fox*, 36 Eng. L. and Eq. 486; and the master is bound to exercise ordinary care and prudence that those in his employ are not exposed to unnecessary hazards or unreasonable risks and dangers: *Noyes v. Smith*, 28 Vt. 64; *Connolly v. Poillon*, 41 Barb. 366. So, where a servant is engaged in a business only ordinarily hazardous, and is commanded by another servant to whom the former is subordinate and whose direction he is compelled to obey, to perform a duty in the same general service, but different from the sphere of employment in which he had engaged to serve, and which is extrahazardous in its character, and in respect to which the servant making the requirement knew he was inexperienced and unskilled, and in doing the work, the servant so directed receives injuries through the negligence of a fellow-servant employed in the particular line of service which he is then engaged in performing, the employer is liable; as, where a servant whose employment was to load cars, was directed by a superintendent to make a coupling of cars in a train, which was outside of his general employment: *Lalor v. C. B. & Q. R. R.*, 52 Ill. 401; *R. R. Co. v. Fort*, 17 Wall. 553. The master does not warrant or guarantee the fitness or competency of his servants: *C. C. & I. C. R. W. Co. v. Troesch*, 68 Ill. 545; *S. C.*, 18 Am. Rep. 578; *Tarrant v. Webb*, 18 C. B. 797; *Ormond v. Holland*, EL B. & EL. 102; *Indianapolis and Cincinnati R. R. Co. v. Love*, 10 Ind. 554; *Faulkner v. Erie R. Co.*, 49 Barb. 324; *Beaulieu v. Portland Co.*, 48 Me. 291; *Moss v. Pacific R. R. Co.*, 49 Mo. 167; *S. C.*, 8 Am. Rep. 126. But to render him liable to a servant for negligence of an incompetent fellow-servant, the master need not have had actual knowledge of such incompetency: *Byron v. N. Y. State Printing Tel. Co.*, 26 Barb. 39; *Brickner v. N. Y. C. R. R. Co.*, 2 Lans. 506. It is sufficient that he would have acquired the knowledge if he had exercised reasonable care and diligence: *Noyes v. Smith*, *supra*; *Harper v. Indianapolis & St. L. R. R. Co.*, 47 Mo. 567; *S. C.*, 4 Am. Rep. 353.

An important element which has manifested itself in some of the cases growing out of the relation of master and servant, is that which relates to the obligation of the former in regard to servants who were originally com-

petent and skillful when employed, but have subsequently become otherwise, from habits of intemperance, or habitual carelessness or recklessness. It will be the duty of the master to dismiss from his service any servant, who from the causes mentioned, or others of that character, becomes careless or incompetent, at the risk of being liable for the consequences of such servant's negligence to fellow-servants, if he does not do so: *C. C. & I. C. R. Co. v. Troesch, supra*; *Laning v. N. Y. C. R. R. Co.*, 49 N. Y. 521; S. C., 10 Am. Rep. 417. In *Chapman v. Erie R. R. Co.*, 55 N. Y. 579, which was an action by the administratrix of an engineer to recover for injuries received by the latter in a collision, due to the intoxicated condition of a telegraph operator, whose duty in defendant's employ was that of train-dispatcher, this subject was reviewed. The lower court charged the jury, "that if after a competent person is employed for a duty, his habits become such that it is unsafe to trust him any longer in that capacity, the company are bound to use, through their proper officers, such reasonable care and diligence in ascertaining what the man is, after he is employed, as they would be in his original employment." Reversing a judgment for the plaintiff, the court, *per* Church, C. J., said, in relation to the foregoing instruction: "We think this rule of diligence is too broad, and can not be sustained. The general rule is, that notice or knowledge of incompetency is necessary to charge the principal with the duty of acting. In employing subordinates, the principal must exercise great care, and is required to institute affirmative inquiries to ascertain their character and qualifications, and negligence in this respect will create a liability: but after suitable persons have been employed, there is not the same reason for exacting such a high degree of diligence. Good character and qualifications once possessed are presumed to continue, and there is no reason why a principal may not rely upon that presumption as to these personal qualities until he has notice of a change, or knowledge of such facts as would be deemed equivalent to notice, or at least such as would put a reasonable man upon inquiry. The charge permitted the jury without restriction or limit to determine what particular supervision or watchfulness was necessary to exonerate the defendant from the charge of negligence. They might require periodical investigations, or an efficient detective system. They were at liberty to adopt any rule, and might adopt one which would practically make the defendant a guarantor of the correctness of every act of its employees. We have been referred to no authority for such a doctrine, and it would be manifestly unjust to adopt it. If competent when employed, additional experience would naturally render an employee more so, and while his habits might change for the worse, there is no such depravity in human nature as in law requires special vigilance on the part of the employer to prevent it." Where the employee is so grossly and notoriously unfit for the service that not to know his unfitness is negligence, the law will presume notice to the employer: *C. R. I. & P. R. R. v. Doyle*, 18 Kan. 58.

SERVANT MAY RECOVER FOR PERSONAL NEGLIGENCE OF MASTER by which incompetent or inefficient persons have been employed in the common service, and if such personal remissness of the master be properly made out, under the rule previously stated, a recovery will not be defeated because the negligence of a fellow-servant was the immediate origin of the injury. Personal negligence is the criterion by which the liability of the master is to be determined. If he has negligently employed a careless or incompetent fellow-servant, the latter's carelessness or incapacity may be aptly said to be that of the master himself. He stands in the place of, and represents the master, because the latter has negligently or knowingly admitted him to a ser-

vice for which he was either unfit or incompetent. So, a railroad company is liable for injuries sustained by a brakeman, as the result of the culpable rate of speed at which the engineer of a locomotive ran the train upon a descending grade; it being shown that the engineer was known to the corporation to be a careless and reckless person, inclined to fast running and inattentive to the rate of speed prescribed by the regulations of the corporation: *Illinois Central R. R. Co. v. Jewell*, 46 Ill. 101. In *Harper v. Indianapolis etc. R. R. Co.*, *supra*, the rule was stated to be that a servant who has been injured by the negligence, misfeasance, or misconduct of a fellow-servant, can maintain an action therefor against the master, where the servant by whose negligence or misconduct the injury was occasioned, was not possessed of ordinary skill or capacity in the business intrusted to him, and the employment of such incompetent servant was attributable to the want of ordinary care on the part of the master. The principle was applied in that case to charge a railroad company with liability for injuries to a conductor, through negligence of an engineer in permitting a fireman to take charge of the engine, when incompetent for duty.

So, it has been stated, that if the negligence of the co-employee be in respect to some act or duty which the employer himself, as master or principal, is required to perform, he will be liable. Accordingly, where a servant, whose duty it was to make up and dispatch trains and to hire and station brakemen, sent out a heavy freight train with but two brakemen, when three were required, and the train broke in two, and in consequence of the want of the necessary brakemen the rear part ran backward and collided with another train which was following the first, killing the fireman thereof, the corporation was held liable: *Mike v. Boston and Albany R. R. Co.*, 53 N. Y. 549; S. C., 13 Am. Rep. 545; in like manner, where an employee whose duty it was to employ men for a particular department of the service, employed a foreman who afterwards became addicted to habits of intoxication, this fact being known to the agent, it was held that the principal was liable for the act of the foreman, who, while intoxicated, directed persons to erect a scaffold, who were incompetent and unskillful, as a consequence of which it was so defectively constructed that it fell while plaintiff was working thereon and injured him: *Laning v. N. Y. C. R. R.*, 49 N. Y. 521; S. C., 13 Am. Rep. 545. The cases are not numerous in which the master has been held liable for injuries received by a servant in his employ, and which were caused by the negligence of a fellow-servant. However, if negligence may be imputed to the master, he will no doubt be made to respond in damages, although the negligence which immediately produced the injury may have been that of a fellow-servant: *Brothers v. Cartier*, 52 Mo. 372; S. C., 14 Am. Rep. 424; *Illinois Central R. R. Co. v. Welch*, 52 Ill. 183; *Cayser v. Taylor*, 10 Gray, 274; *Keegan v. Western R. R. Co.*, 8 N. Y. 175; *Blake v. Maine C. R. R. Co.*, 70 Me. 60; S. C., 35 Am. Rep. 297; *Tyson v. N. & S. Ala. R. R. Co.*, 61 Ala. 554; S. C., 32 Am. Rep. 8; *Cone v. D. L. & W. R. R. Co.*, 15 Hun, 172; *McMahon v. Davidson*, 12 Minn. 357; *Railway Co. v. Dunham*, 49 Tex. 181; *Hardy v. Carolina Central R'y Co.*, 76 N. C. 5; *O. & N. W. R. R. Co. v. Jackson*, 55 Ill. 492; *Paulmier v. Erie R. R. Co.*, 34 N. J. L. 151. It is not sufficient to charge the master with negligence that a prior act of carelessness had been charged against the servant: *Baulec v. N. Y. & H. R. R. Co.*, 59 N. Y. 356; S. C., 17 Am. Rep. 325. It has been held that from the extraordinary or gross negligence of a co-employee the master is not exonerated: *Louisville and Nashville R. R. Co. v. Filbern*, 6 Bush, 574.

CONTRIBUTORY NEGLIGENCE OF SERVANT either in relation to the particular

act by which the injury was caused, or generally, in continuing in the employment after knowledge of the incompetency of a fellow-servant, will defeat his right to recover: *Davis v. Detroit and Milwaukee R. R. Co.*, 20 Mich. 105; S. C., 4 Am. Rep. 364; *Mad River and Lake Erie R. R. Co. v. Barber*, 5 Ohio St. 541; *Indianapolis etc. R. R. Co. v. Love*, 10 Ind. 554; *Skip v. Eastern Counties Ry Co.*, 9 Exch. 223; *Wright v. N. Y. C. R. R.*, 25 N. Y. 566; *Frazier v. Pa. R. R. Co.*, 38 Pa. St. 104; *Kroy v. C. R. I. & P. R. R.*, 32 Iowa, 357; *Dillon v. U. P. R. R.*, 3 Dill. 319; *Wiggins Ferry Co. v. Blakeman*, 54 Ill. 201; *Railroad Co. v. Knittel*, 33 Ohio St. 468; *Shanny v. Androscoggin Mills*, 66 Me. 420. But if the master has promised to amend the defect, or held out other like inducement, as that he will discharge an incompetent fellow-servant, he is not exonerated from liability by the mere fact that the servant who is injured remained in the employment with knowledge of such defect or incompetency: *Loring v. N. Y. C. R. R.*, 49 N. Y. 521; S. C., 10 Am. Rep. 417; *Clarke v. Holmes*, 7 H. & N. 937.

FELLOW-SERVANTS, WHO ARE.—Some diversity of authority exists in regard to the question who are to be deemed fellow-servants within the meaning of the rule. Lord Cranworth, in the renowned case of *Bartonshill Coal Co. v. Reid*, 3 Macq. 295, defined the relation as follows: "To constitute fellow-laborers within the meaning of the doctrine which protects the master from responsibility for injuries sustained by one servant through the wrongful act or carelessness of another, it is not necessary that the servant causing and the servant sustaining the injury shall both be engaged in precisely the same or even similar acts. Thus, the driver and guard of a stage-coach, the steersman and rowers of a boat, the man who draws the red-hot iron from the forge and those who hammer it into shape, the engineer and switch-man, the man who lets the miners down into and who afterwards brings them up from the mine, and the miners themselves, all these are fellow-servants and collaborators within the meaning of the doctrine in question." The rule is not affected by the fact that the rank of the servants is different, or that the grade of employment in which the injured servant is engaged is inferior to that of the servant by whose negligence the injury was caused: *Adro v. Agawam Canal Co.*, 6 Cush. 75; *Wigmore v. Jay*, 5 Exch. 354; *Feltham v. England*, 2 L. R. Q. B. 33; *Peterson v. Whitebreast C. & M. Co.*, 50 Iowa, 673; S. C., 32 Am. Rep. 143; *Collier v. Steinhart*, 51 Cal. 116; *McLean v. Blue Point Gravel M. Co.*, Id. 255; *O'Connor v. Roberts*, 120 Mass. 227; *Marshall v. Schricker*, 63 Mo. 306; *Malone v. Hathaway*, 64 N. Y. 5; S. C., 21 Am. Rep. 573; *Zeigler v. Day*, 123 Mass. 152; *Hofnagle v. N. Y. C. & H. R. R. Co.*, 55 N. Y. 606; *Lawler v. Androscoggin R. R. Co.*, 62 Me. 463; *Blats v. Maine Central R. R. Co.*, 67 Id. 60; S. C., 35 Am. Rep. 297; *Thayer v. St. Louis, Alton etc. R. R. Co.*, 22 Ind. 26; nor is the rule changed because the servants are engaged in separate and distinct departments of the service, if they are subject to the same general control and the employment is a common one: *Columbus & Ind. Cent. R. R. Co. v. Arnold*, 31 Ind. 174; *Forster v. Minnesota Cent. R. Co.*, 14 Minn. 360; *Railway Co. v. Lewis*, 33 Ohio St. 196; *Kielley v. Belcher S. M. Co.*, 3 Sawyer, 500; *St. Louis & S. E. Ry Co. v. Britz*, 72 Ill. 256; *C. & A. R. R. Co. v. Murphy*, 53 Id. 336; S. C., 5 Am. Rep. 48; *Cooper v. Milwaukee and Prairie du Chien R. Co.*, 23 Wis. 668; *Slattery v. T. & W. Ry. Co.*, 23 Ind. 81; *Baulec v. N. Y. & H. R. R. Co.*, 59 N. Y. 356; S. C., 17 Am. Rep. 325; *Sammon v. New York & H. R. R. Co.*, 62 N. Y. 251; *Hodgkins v. Eastern R. R. Co.*, 119 Mass. 419; *Whaalan v. M. R. & Lake Erie R. R. Co.*, 8 Ohio St. 249; *Ohio & M. R. R. Co. v. Hammersley*, 28 Ind. 371.

A common laborer in the employ of a railroad company, who is conveyed to and from his labor, as a part of his contract of service, is a co-employee with the other servants who have charge of the train of cars in which he is being conveyed: *Gillshannon v. Stony Brook R. R. Co.*, 10 Cush. 298; *Tunney v. Midland R. R. Co.*, 1 L. R. C. P. 291; *Seaver v. Boston and Maine R. R. Co.*, 14 Gray, 466; *Kansas Pacific R. R. Co. v. Salmon*, 11 Kan. 83. A conductor who is being conveyed upon his employer's railroad to a certain point on the road, under instructions requiring him to proceed to that point to take charge of a train there, is also a fellow-servant with those who have the management of the cars in which he is riding: *Manville v. Cleveland and Toledo R. R. Co.*, 11 Ohio St. 417; but in *O'Donnell v. Allegheny Valley R. R. Co.*, 59 Pa. St. 239, it was held that a carpenter, working as such for a railroad company, while being conveyed to or from his work, was a passenger, and not a fellow-servant with the employees engaged in running the train or repairing the track. And where an express company hired its freight transported on the steamer or railroad of a company engaged in transporting freight or passengers for hire, as common carriers, and hired an agent to take charge of such freight, whose passage was paid for in the contract, such agent occupies the position of an ordinary passenger, and the carrier is liable for the injuries he may sustain from the negligence of its employees: *Yeomans v. Contra Costa S. N. Co.*, 44 Cal. 71. And the rule is the same, although the agent was the proprietor of a bar, for the sale of liquors and cigars on board the carrier's steamer on which he was conveyed as a part of his contract: *Id.* In *McAndrews v. Burns*, 30 N. J. L. 117, Dalruple, J., defined the relation comprehended by the term fellow-servant as follows: "A fellow-servant I take to be any one who serves and is controlled by the same master. Common employment is service of such kind that, in the exercise of ordinary sagacity, all who engage in it may be able to foresee, when accepting it, that through the negligence of fellow-servants, it may probably expose them to injury. The ground on which rests the exemption of the master from liability to the servant for negligence of a fellow-servant engaged in a common employment is, that the servant is presumed to contract in reference to the risk incurred. So in *Vallee v. O. & M. R'y Co.*, 85 Ill. 500, holding that where a servant of a railway company sustained a personal injury while engaged in repairing cars, through the negligence of a fellow-servant, a driver of a switch engine, in mistaking a signal while propelling cars, was not entitled to recover, the court declared a proper test of the relation to be, whether the negligence of one servant was likely to inflict injury on another. Upon the question whether, where the employment of the respective servants is in separate and distinct departments or divisions of the common service, they are to be considered co-employees, so as to subject them to the operation of the rule, the authorities are not entirely harmonious. Particularly in Illinois, the doctrine prevails, that where the servants of a common master are not associated together in the discharge of their duties, where their employment does not require co-operation, and does not result in mutual contact, or bring them together in such relation that they may exercise upon each other an influence promotive of safety or caution, the reason of the rule does not apply: *C. & N. W. R. R. Co. v. Moranda*, 93 Ill. 302; S. C., 34 Am. Rep. 168; *C. R. I. & P. R. R. Co. v. Henry*, 7 Ill. App. 322; *C. & N. W. R. R. Co. v. Swett*, 45 Ill. 197; *T. W. & W. R. Co. v. O'Connor*, 77 Id. 391; *Ryan v. C. & N. W. R. Co.*, 60 Id. 171.

A sub-contractor for the purpose of building bridges on the line of a railroad is not a co-servant of those employed by the corporation in operating the

road and managing trains thereon: *Donaldson v. Mississippi & Mo. R. R. Co.*, 18 Iowa, 280. Servants of a contractor and those of a sub-contractor are not co-servants within the meaning of the rule: *Abraham v. Reynolds*, 5 H. & N. 142; *Murphy v. Caralli*, 3 H. & C. 482; *Young v. N. Y. C. R. R. Co.*, 30 Barb. 229; *Hunt v. Pennsylvania R. R. Co.*, 51 Pa. St. 475; *Murray v. Currie*, 6 L. R. C. P. 24; *Hass v. Philadelphia & S. M. S. Co.*, 88 Pa. St. 269; S. C., 32 Am. Rep. 462; *Riley v. State Line S. S. Co.*, 29 La. Ann. 791; S. C., 29 Am. Rep. 349; *Goodfellow v. Boston, H. & E. R. R. Co.*, 106 Mass. 461; *Svenson v. A. M. S. S. Co.*, 57 N. Y. 108; *Curley v. Harris*, 11 Allen, 113; but where the servants of the contractor are under the general direction, control, and supervision of the person for whose benefit the work is being done, the servants of the former are co-servants with those of the latter, so as to exonerate him from the consequences of their negligence: *Johnson v. Boston*, 118 Mass. 114; *Rourke v. White Moss Colliery Co.*, 1 L. R. C. P. Div. 556; so, where one railroad company under a mutual arrangement with another, is permitted to run its trains upon the track of the other, the servants employed by the respective companies are not co-servants, and an action may therefore be sustained by the servants of one company to recover for injuries caused by the negligence of the servants of the other: *Sawyer v. Rutland and Burlington R. R. Co.*, 27 Vt. 370; *N. & C. R. R. Co. v. Carroll*, 6 Heisk. 347; *Smith v. N. Y. & H. R. R. Co.*, 19 N. Y. 127; *Catawissa R. R. Co. v. Armstrong*, 49 Pa. St. 186; *Carroll v. Minnesota Valley R. R. Co.*, 13 Minn. 30; *Warburton v. G. W. R. Co.*, 2 Exch., 1866-7, 29.

When the position of a servant is such that he is the agent of the master in respect to some matter which the master himself is bound to perform, as in the preparation of materials, construction of machinery, or the employment of servants in the common service, he is not a fellow-servant with those into whose hands the mere manual execution of the business is intrusted, but rather occupies the place of the master himself, and stands in the same position as the master would have done had he taken charge of the conduct of the work in person, instead of confiding its management into the hands of an agent. For the negligence of his servant or agent in such case, the master is responsible in the same manner as if the act was his own: *Brabbitt v. Chicago & N. W. R. Co.*, 38 Wis. 289; *Gormly v. Vulcan Iron Works*, 61 Mo. 492; *Berea Stone Co. v. Kraft*, 31 Ohio St. 287; S. C., 27 Am. Rep. 510; *Cumberland & Pa. R. R. Co. v. State*, 44 Md. 283; *Devany v. Vulcan Iron Works*, 4 Mo. App. 236; *Mullan v. Phila. & S. M. S. Co.*, 78 Pa. St. 75; *Snow v. Housatonic R. R. Co.*, 8 Allen, 447; *Fuller v. Jewett*, 80 N. Y. 46; S. C., 36 Am. Rep. 575; *T. W. & W. E'y Co. v. Inghram*, 77 Ill. 309; *Dobbin v. Richmond and Danville R. R. Co.*, 81 N. C. 446; S. C., 31 Am. Rep. 512. An illustration of this principle may be stated in the case of injuries resulting from an explosion of a boiler, which was permitted to become and remain unsafe, on account of the negligence of the persons charged with the control of the department of the service relating to construction and repairs: *Fuller v. Jewett*, *supra*; *T. M. & W. E'y Co. v. Moore*, 77 Ill. 217; or, where the injury was the result of the negligence of an employee in charge of that department, to furnish a train with a sufficient number of brakemen: *Booth v. Boston and Albany R. R. Co.*, 73 N. Y. 38; S. C., 29 Am. Rep. 97; so also a brakeman may maintain an action against the corporation for injuries sustained through its negligence to have its cars inspected: *Brann v. C. R. I. & P. R. R. Co.*, 53 Iowa, 596; S. C., 36 Am. Rep. 243.

THE RULE HAS BEEN CHANGED BY STATUTE IN SOME STATES.—This is the case in Georgia and Iowa. A distinction is still made, notwithstanding, in

those states, between the case of an employee, who sustains injury through the negligence of a fellow-servant, and that of a stranger. It is said in the former state, that the distinction made by the code between an employee injured, and other persons, is, that the employee must be wholly blameless, while others may recover though partly at fault: *Thompson v. Central R. R. & B. Co.*, 54 Ga. 509. The supreme court of Iowa declared that the distinction between the liability of a carrier to its passengers and that which, under the statute, it bore toward its employees, was, that while extraordinary care was due the passenger, ordinary care only was due to the employee: *Hunt v. Chicago & N. W. R. R. Co.*, 23 Iowa, 363.

ANDERSON v. FULLER.

[1 McMULLAN'S EQUITY, 27.]

DEBTOR MAY GIVE PREFERENCES AMONG HIS CREDITORS; but if, in the deed of assignment, he reserves any advantage to himself, such reservation vitiates the deed, and the advance of additional consideration at the time of the conveyance will not change such result.

LEAVING A DEBTOR IN POSSESSION OF HIS PROPERTY is such a benefit as vitiates an assignment made by him, for the benefit of his creditors.

CONVEYANCE, WHEN SET ASIDE ON THE LEGAL INFERENCE OF FRAUD, in the absence of any evidence of a corrupt agreement between the parties, will be allowed to stand as security for any consideration advanced by the grantee.

BILL in equity to set aside an assignment for the benefit of creditors. Thomas D. Steedman, an insolvent and judgment debtor, on March 5, 1836, conveyed to the other defendant, Fuller, in consideration of one thousand nine hundred and fifty dollars, the premises upon which he resided, containing three hundred and ninety acres. At that time the land was mortgaged to the ordinary to secure the purchase price, amounting to five hundred and fifty-three dollars. Contemporaneously with such conveyance, an agreement was entered into between the parties defendant, that, in part consideration therefor, Fuller would pay off all debts and judgments of Steedman. The agreement further provided that Steedman might occupy and cultivate the land for the present year, and upon repayment of the sums advanced in extinguishing the liens thereon, might have the option of redeeming the same. In pursuance of this agreement Fuller paid off and satisfied all judgments and other liens upon the land. Steedman had always continued to reside on and cultivate a portion of the land. In the fall of 1836, complainants recovered judgment against Steedman, and upon the return of the execution *nulla bona*, brought this suit to set

aside the above deed as fraudulent. Complainants had decree in their favor, and defendants appealed.

Young, for the appellants.

Sullivan, for the appellees.

By Court, HARPER, Chancellor. We concur with the chancellor in thinking that the case comes within the principle of the decisions in the cases of *Smith v. Henry*, 1 Hill's Ch. 52,¹ and *Maples v. Maples*, Rice's Eq. 310. And it does not seem to us material whether the conveyance be regarded as a mortgage or a sale. It was, evidently, the understanding of the parties, that it was a sale with the right of redemption, and in pursuance of this understanding the premises were generally surrendered to the defendant Fuller; the defendant Steedman being permitted to retain the hundred acres in question. This is the case in which the law draws the inference, that this advantage was the consideration on which the preference was given to the creditor. The answer of Fuller is not evidence to show that it was upon a subsequent agreement to sell, that Steedman was put into possession; nor is the testimony of Steedman material. It is said in the case of *Smith v. Henry*, that it makes no difference that an additional consideration is advanced at the time. In general, when a conveyance is set aside for fraud, it is within the discretion of the court to decree the conveyance to stand as a security for the money actually paid. This is commonly done where there is no imputation of moral fraud, or the proof of actual fraud is in any degree doubtful: See *McMeekin v. Edwards*,² 1 Hill's Ch. 294, and the cases there referred to. And this does not disagree with the case of *Miller v. Tollison*, Sta. Eq. 145 [14 Am. Dec. 712], where a conveyance absolute on its face, having been made to secure a previous debt, and the grantee having fraudulently attempted to set it up as an absolute conveyance against creditors, the court would not allow it to stand as a security for the money actually due. As the rule of *Smith v. Henry* is an inference of strict law, on account of the danger of any other construction; as it may be that there was no corrupt agreement between the parties, but an act of spontaneous kindness and indulgence on the part of the grantee, perhaps it would be generally proper, when setting aside a conveyance on the legal inference alone, to decree it to stand as a security for any consideration advanced at the time.

In this case there was a consideration at the time. The de-

1. 1 Hill's L. 16.

2. *McMeekin v. Edmonds*; 8 C., 26 Am. Dec. 203.

feudant covenanted to pay off the mortgage to the ordinary and the judgments having a lien on the land, which he has since done. But this is stronger than the ordinary case of money paid at the time. If a person having the oldest judgment against another, to the full value of the property, should take an assignment of the property in satisfaction of the judgment, this would not come within the rule of *Smith v. Henry*. The assignee had already a right to be satisfied out of the property, in preference to all other creditors, and it could be no fraud on them to take from them what they never could have got. The mortgage to the ordinary had the first lien on the land, and if, without taking a conveyance, the defendant had paid it off and taken an assignment to himself, he would have had the same priority. So if he had paid off the judgments having a lien on the land, and taken an assignment, his own judgments were entitled to satisfaction out of the property, in preference to all subsequent liens, or creditors. And certainly there can be no wrong to the complainants or any subsequent creditors, that these claims should be first satisfied out of the land. The course of the English practice would be, to decree that the complainants should have the right to redeem, but it is the established practice of our courts, to direct a sale of the land and the payment of the proceeds to creditors according to their priorities. For this purpose, it will be necessary to order a sale of the entire tract of land. It is, therefore, ordered and decreed, that the commissioners take an account of the liens, existing on the land at the time of the conveyance, and which were satisfied by the defendant Fuller, including his own judgments; and of all other liens, prior or subsequent to the conveyance; that the complainants be at liberty to redeem the land by paying to the defendant Fuller the amount which may be found due him on account of the said liens, extinguished by him on or before the first day of January next; or if they shall fail to do so, that the commissioner proceed on that, or some other convenient sale day, to sell the entire tract of land for cash, and that he pay the proceeds of the sale to the defendant Fuller and the other creditors of the said Thomas J. Steedman, according to the priority of the said liens. Costs to be paid out of the proceeds of the sale.

Chancellors JOHNSON and DUNKIN concurred.

RIGHT OF A DEBTOR TO GIVE PREFERENCES among his creditors, and the limitations thereon, are subjects discussed in the note to *Crawford v. Taylor*,

26 Am. Dec. 584. See, also, *Nixon v. Douglas*, 30 Id. 368; *Shipwith v. Cunningham*, 31 Id. 642.

RESERVATION IN A DEED OF ASSIGNMENT for the benefit of creditors of any advantage to the debtor will vitiate the assignment: *Austin v. Bell*, 11 Am. Dec. 297; *Mackie v. Cairns*, 15 Id. 477, and note; *Beck v. Burdett*, 19 Id. 436; *McClurg v. Lecky*, 23 Id. 64.

HANCOCK v. DAY.

[1 McMULLAN'S EQUITY, 69.]

CO-TENANT, IN THE EXCLUSIVE POSSESSION OF LAND, is liable for the rent of so much of the premises as was capable of producing rent at the time he took possession, but not for what was rendered capable by his labor.

CO-TENANT IS LIABLE FOR WASTE committed by him on the common property.

CO-TENANT IS NOT ENTITLED TO COMPENSATION for improvements made by him on the common property.

BILL for partition brought by Nancy, Simon, and William J. Hancock, infants, suing by their guardian, against Martin H. Day, their tenant in common of certain lands, of which the defendant had been in the exclusive possession, praying for a partition of the same, and that the defendant should account for the rents and profits thereof, whilst in his possession. The defendant admitted the co-tenancy, but alleged that he had never cultivated more than his share of the land, and claimed that therefore he was not liable for the rents and profits. Upon the hearing of the report of the commissioner appointed to make partition, the chancellor decreed, that the defendant was liable for three fourths of the rental value of the land from the time that he came into possession, for any waste that he might have committed, subject to a right of set-off for the value of any improvements erected by him on the land. From this decree defendant appealed.

Wardlaw and Wardlaw, for the appellant.

No appearance for the appellees.

By Court, JOHNSTON, Chancellor. It appears that the questions respecting rent, involved in this appeal, were decided several years ago, in two cases, yet in manuscript, which, it is to be regretted, have not been reported. I refer to the cases of *Thompson v. Bostick*,¹ M. S. E. 345, and *Carr v. Robertson*, M. S. F. 74; of which I never heard until they were suggested on

the argument of this appeal. The general rule established by them is, that as between co-tenants, the occupying tenant is liable for the rent of so much of the premises as was capable of producing rent at the time he took possession, but not liable for what was rendered capable by his labor. If he commits waste (and the pleadings make a case of waste), he is liable for that. If he makes improvements, he is not entitled to raise a charge for them. It is unnecessary to do more than state what the cases decide. For the reasons of the decision, I refer to the opinions delivered in the cases themselves. A motion was made that the defendant's share of the lands sold in this case be retained, in order to satisfy out of it what shall be established against him on the score of rent. It was not shown that he was insolvent, or in doubtful circumstances; nor was any special reason assigned why the order should be granted; and certainly he should not have been subjected to the loss which would have accrued from granting the motion, unless for some reason rendering it necessary. The court is of opinion that it was properly refused, and dismiss the plaintiff's appeal on that point.

Let the circuit decree be modified, and let the report be re-committed, to be reformed according to this opinion.

Chancellors JOHNSON, HARPER, and DUNKIN concurred.

The case of *Thompson v. Bostick*, 1 McMullan's Eq. 75, referred to in the opinion of the court in the principal case, was a suit in equity by one tenant in common against another in possession for rent. The common property consisted of a large tract of land, of which about half was cleared and fit for cultivation. This the defendants cultivated. While in the exclusive possession of the common property, they caused more land to be cleared and cultivated, and erected improvements thereon. In rendering his opinion in the lower court the chancellor said that the defendants "ought to be charged with the rent of land, estimated as it was when they took possession of it, and are not to be charged with the rent of the newly cleared land or credited for improvements. There is nothing, I think, in the objection that defendants did not receive rent, but cultivated the land themselves. To cultivate and have the use of lands, is to receive the rents and profits, though the occupier is his own tenant. * * * They are not to be charged with the rent of the land cleared by them, because the premises were rendered capable of producing that rent by means of their improvement. The clearing of the land was waste; but if the value of the whole premises was improved by it the complainants would only recover nominal damages at law. If the value had been deteriorated, damages might have been recovered according to the injury." Upon appeal to the court of appeals this decree of the chancellor was affirmed.

LIABILITY OF CO-TENANT FOR THE EXCLUSIVE USE and occupation of the common property: *Nelson v. Clay*, 23 Am. Dec. 387, and note citing the prior cases in this series. See also *Ruffners v. Lewis*, 30 Id. 513. The prin-

cial case is not in harmony with the weight of the authorities upon the subject. In England, and we think in a majority of the United States, where no statutory rule to the contrary has been adopted, a tenant in common, while answerable for rents and profits by him received, can not be made to pay rent for the premises when occupied by him personally, there being no suster of his co-tenants: *Freeman on Co-tenancy and Part.*, secs. 274-276.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

GRACE v. HALE.

[2 HURDINETS, 27.]

INFANT MAY RESCIND CONTRACT OF EXCHANGE though he thereby obtains property necessary for his use.

HORSE IS NOT NECESSARY FOR AN INFANT, though the latter was permitted to cultivate a portion of his father's land for his own benefit.

TROVER. The facts sufficiently appear from the opinion. Judgment for plaintiff; the defendant appealed.

R. J. McKinney, for the plaintiff in error.

T. D. Arnold, *contra*.

By Court, **REESE, J.** This is an action to recover the value of a horse owned by the plaintiff and given by him, he being a minor, to the defendant in exchange for another. Plaintiff lived with his father and was maintained by him, but being permitted to cultivate, for his own benefit, a portion of his father's land, it is contended that a horse proper for agricultural operations became, under the circumstances, necessary for the infant, and that his contract for exchange will bind him. The supposed error in the judgment below, which was in favor of the infant, here mostly insisted on, is that the court charged the jury that the question whether necessities or not is one exclusively for the court, with which the jury have nothing to do; and in the sense in which this was said by the court it is certainly correct. It is matter of law that the necessities for which an infant may bind himself by contract, consist of diet, apparel, washing, lodging, schooling, and medicine; but whether within these limits certain articles were in fact necessary, and to

what extent, becomes, in the language of Lord Kenyon, 1 Esp. 212,¹ a relative fact to be governed by the fortune and circumstances of the infant: 8 T. R. 578.² But it seems to us that this question did not here arise. The question here is not for what necessities and to what extent an infant may make himself liable, but whether an infant can sell or exchange his property.

It has been held that if an infant sell goods the sale is void, and if the vendor takes them trespass will lie; but if the infant deliver them with his own hands that form of action will not lie, but he may avoid the contract of sale: 1 Mod. 187.³ So it has been held in this country, that an infant having sold personal property may at full age disaffirm the sale and reclaim the property: *Williams v. Morris*, 2 Bibb, 107.⁴ But it is said, that the contract of sale or exchange in this case is rendered valid, because the horse was, under the circumstances, necessary for the infant. But it has been ruled that if an infant become a shopkeeper and buy goods and wares for the use of his shop, the contract does not bind him: 1 Roll. 729; 2 Cro. 494.⁵ If he borrow money, though he afterwards employ it for necessities, he is not liable to the vendor: 1 Roll. 279; or even if it were lent to him for the purpose of procuring necessities, for the lender ought to provide them: Id. 386, 387. The sale or exchange therefore, by parity of reasoning, would not be rendered valid merely because the thing obtained thereby might be necessary. But we are of opinion, also, that in this case the horse procured was not a necessary within the meaning of the law; we are also of opinion that the court did not err in holding that in such an action the plaintiff was entitled to recover the value of the property, and that the jury ought not to take upon themselves to make an equitable adjustment between the parties.

Let the judgment be affirmed.

INFANT'S CONTRACTS.—A sale made to an infant by a person of full age is voidable only by the infant: *Oliver v. Howdlet*, 7 Am. Dec. 134; and a contract to marry an adult is voidable at the election of the infant, but not void. The infant may maintain an action for a breach of contract, while the adult can not: *Hunt v. Peake*, 15 Id. 475; *Willard v. Stone*, 17 Id. 496. A contract made by an infant and an adult is binding on the latter only, against whom alone an action can be sustained: *Hull v. Connolly*, 15 Id. 612. And the infancy of a party contracting can not be set up by the other party in defense to an action brought by the minor for the enforcement of the contract: *Arnous v. Lesassier*, 29 Id. 470.

1. *Ford v. Pothery*, 11.

2. *Hinds v. Slaney*.

3. *Manby v. Scott*.

4. *Williams v. Norris*, 2 Litt. 157.

5. *Whittingham v. Hull*, Cro. Jac. 464.

Infants are compelled to elect whether to affirm or disaffirm on coming of age: *Overbach v. Heermance*, 14 Id. 546. There need be no direct promise on the part of the infant to amount to a ratification: *Whitney v. Dutch*, 7 Id. 229; but the ratification must be something more than a mere acknowledgment: *Benham v. Bishop*, 23 Id. 358; *Lawson v. Lovejoy*, Id. 526; *Thompson v. Lay*, 16 Id. 325. For examples of what amounts to a ratification, see *Bigelow v. Kinney*, 21 Id. 589; *Martin v. Mayo*, 6 Id. 103; *Smith v. Mayo*, Id. 28; *Lawson v. Lovejoy*, 23 Id. 526; *Benham v. Bishop*, Id. 358; *Dana v. Coombs*, 19 Id. 194. A ratification may be inferred: *Bigelow v. Kinney*, 21 Id. 589; *Lynde v. Budd*, Id. 84. Anything from which assent may fairly be deduced will be regarded as a confirmation: *Cheahire v. Barrett*, 17 Id. 735; *Wheaton v. East*, 26 Id. 251. An infant must either affirm or disaffirm the whole contract; he can not affirm a part and disaffirm the balance: *Robert v. Wiggins*, 8 Id. 38; *Bigelow v. Kinney*, 21 Id. 589.

Infant's contracts for necessities are binding: *Fridge v. State*, 20 Id. 463; *Lawson v. Lovejoy*, 23 Id. 526; *Wheaton v. East*, 26 Id. 251; *Stone v. Denison*, 23 Id. 654; and for necessities suitable to his rank and condition: *Kline v. L'Amoureux*, 22 Id. 652; but a horse does not properly come under the designation of necessities: *Rainwater v. Durham*, 10 Id. 637. And an infant under the care of a parent or guardian, able and willing to furnish him actual necessities, can make no binding contract therefor: *Kline v. L'Amoureux*, 22 Id. 652.

TYLER v. STATE.

[2 HUMPHREYS, 57.]

INDICTMENT FOR OBTAINING GOODS BY FALSE PRETENSES, WHAT NECESSARY IN.—It is an indispensable requisite of an indictment for obtaining goods by false pretenses that there be an absolute negative of the truth of the pretenses employed.

WHERE GOODS ARE OBTAINED BY MEANS OF A COUNTERFEIT LETTER, an averment in the indictment that the party whose name is signed to the letter "never did write or send, or cause to be written or sent any such letter," is a distinct and sufficient negative of the truth of the pretenses.

INDICTMENT FOR OBTAINING GOODS BY FALSE PRETENSES can be sustained, though the party who purported to be the drawer of the order had no interest in the goods obtained.

INDICTMENT for obtaining goods by false pretenses. The opinion states the case.

Swan, for the plaintiff in error.

Humphreys, attorney-general, for the state.

By Court, GREEN, J. The plaintiff in error was convicted in the Knox circuit court, upon an indictment founded on the act of 1729, c. 34, sec. 50, for obtaining goods by false pretenses. The indictment alleges that the defendant presented to Luttrell & Gains a false and counterfeit letter, purporting to be written by Robert H. Luttrell, which is in the following words:

"Messrs. Gains & Luttrell, at Knoxville, please to let the bearer, E. Tyler, have five dollars in goods, on my account.

"September 28, 1839. Yours, ROBERT H. LUTTRELL."

By means of said letter the said Tyler obtained from the said Luttrell & Gains two silk handkerchiefs worth two dollars, six yards of calico of the value of one dollar, and other goods to the value of two dollars, which goods were delivered upon the faith and credit of said letter, to the said Tyler, "whereas in truth and in fact the said Robert H. Luttrell never did write or send, or cause to be written or sent any such letter to said Luttrell & Gains, or any one else, to let the bearer have any amount in the store whatever." There are three counts in the indictment containing substantially the same statement, except that in the first count the goods are charged as being the property of Mathew M. Gains; in the second count as the property of Mathew M. Gains and James C. Luttrell, and in the third count as the property of Mathew M. Gains, James C. Luttrell, and Robert H. Luttrell.

A motion was made in arrest of judgment, but the motion was overruled and judgment rendered upon the verdict. It is now insisted for the plaintiff in error that the court erred: first, because it is insisted the indictment does not sufficiently negative the truth of the pretenses employed by the defendant. It is certainly an indispensable requisite of an indictment of this character, that there must be an absolute negative of the truth of the pretenses employed: 3 Chit. Crim. L. 189. But we think such a negative is contained in this indictment. The only pretense charged in the indictment to have been employed, was the letter which purported to have been written by Robert H. Luttrell. Having set out the letter the indictment avers "that the said Robert H. Luttrell never did write or send, or cause to be written or sent any such letter to the said Gains & Luttrell, or to any one else, to let the bearer have any amount in the store whatever;" although the idea intended to be conveyed is not very happily expressed in this averment, yet it contained a distinct negative that the letter which had been set out, was written and sent by Robert H. Luttrell. If Robert H. Luttrell never wrote or sent, or caused to be written or sent any such letter as the one copied in the indictment, how could it be true that he wrote and sent the indetical letter by virtue of which the goods were obtained? It could not be; for having done the act spoken of, it could not be said that he had not done such an act.

2. It is next insisted that as this is a forged order for goods, in which the party who purports to be the drawer of the order had no interest, this indictment can not be sustained upon the statute; and the authority of the case of *Walton v. The State*, 6 Yerg. 377, is relied on. In that case the indictment was for forgery founded on the fortieth section of the statute. Had Walton succeeded in obtaining the watch, it was admitted by his counsel (p. 383) that he would have been guilty of the offense punishable by section 50. The two sections are entirely different, and provided for different cases. Section 40 defines forgery and prescribes its punishment. This offense is complete, whether any third person be actually injured thereby or not; but in the case before us, there would be no crime unless some one receive a prejudice from the act: 2 Russ. on Crimes, 350. In *Walton's case*, the indictment was for forging the paper. The watch was not obtained; no person was injured. Here the indictment is for fraudulently, by means of the forged order, obtaining the goods of Gains & Luttrell. The counterfeit letter was only a means by which he was enabled to commit the crime. Any other false token would have made the act of fraudulently getting the goods equally criminal.

Let the judgment be affirmed.

FALSE PRETENSES.—This offense consists in inducing the owner to part with goods, either by willful falsehood or by the offender's assuming a character he does not sustain, or by representing himself to be in a situation he knows he is not in: *People v. Haynes*, 28 Am. Dec. 530. An indictment for obtaining, by false pretenses, a signature to a note need not allege that any one suffered actual loss or prejudice thereby: *People v. Genung*, 25 Id. 594. But whether an indictment for obtaining goods by false pretenses that sets forth several false pretenses inducing the sale of the goods will be sustained by proof of some of the false pretenses, *quære*: *People v. Haynes, supra*.

MCINTIRE v. MCLAURIN.

[2 HUMPHREYS, 71.]

NOTE ASSIGNED BY ONE MEMBER OF A PARTNERSHIP does not pass such an interest in it that the assignee can set it off in a suit on a bill single executed by himself to the assignor, who assigned it after maturity to the plaintiff.

APPEAL in error from the October term of the circuit court of Lawrence county, 1840, Dew, special judge, presiding. The opinion states the case.

N. S. Brown and Wright, for the plaintiff in error.

Combs, for the defendants in error.

By Court, *TURLEY, J.* On the eleventh day of July, 1838, McLaurin executed his bill single to B. & R. Sessums, for five hundred and forty dollars, payable the first day of January following: this was assigned to the plaintiff McIntire by B. & R. Sessums on the fourteenth of June, 1839. On the twenty-third day of June, 1838, B. & R. Sessums executed their note to James Shelton & Co. for five hundred and sixty-two dollars, payable on the first of March following: this note was assigned by James Shelton individually, and not in the name of the company, to McLaurin, on the thirty-first of May, 1839. The plaintiff, McIntire, sued McLaurin and B. & R. Sessums, on the note executed by McLaurin to the Sessums, and they set up the note executed by the Sessums to James Shelton & Co. and assigned by James Shelton to McLaurin as a set-off, which was allowed by the court. To this the plaintiff excepted, and has prosecuted his writ of error to this court. In the argument, several points are incidentally discussed, all of which, except one, we deem it unnecessary to notice, as that is conclusive upon the question and well settled. The note attempted to be used as a set-off, was, as we have seen, executed to James Shelton & Co., and it was only assigned by James Shelton; this did not, either upon principle or authority, pass the interest in the note to the assignee, and therefore he could not use it as a set-off. This question has been so well considered, and so often determined, that we deem it unnecessary to discuss it, and will merely refer to the authorities: 4 Johns. 224;¹ Bailey on Bills, 40; Doug. 653;² 9 Mass. 334;³ Chit. on Bills, 8th Am. ed., 66, 67; 15 East, 7;⁴ 2 Pet. 186.⁵

The judgment of the circuit court will, therefore, be reversed and the cause remanded for a new trial.

SET-OFF, AND WHAT DEMANDS SUBJECT OF: See the note to *Gregg v. James*, 12 Am. Dec. 151, for a discussion of this subject.

MOFFIT v. STATE.

[2 HUMPHREYS, 99.]

WIFE OF PARTY JOINTLY INDICTED WITH OTHERS AS A WITNESS.—Where three parties are jointly indicted for an assault and battery, and two of

1. *Sanford v. Nickles*.

4. *Emily v. Lye*.

2. *Carvick v. Vickery*.

3. *Smith v. Whitting*.

5. *Leroy v. Johnson*.

them are granted a separate trial, the wife of the other is a competent witness in their favor, as her husband has no interest in the event of their trial.

INDICTMENT against W. and J. H. Moffit and James Taylor for an assault and battery upon one John Grigsby. Facts necessary for an understanding of the case are stated in the opinion.

James Campbell, for the defendants in error.

Humphreys, attorney-general, for the state.

By Court, REESE, J. The plaintiff in error and one James H. Moffit, and one James Taylor, were jointly indicted for an assault and battery. When the case came on to be tried, the plaintiff in error made an affidavit, that the wife of J. Taylor, the defendant, who had intermarried with him since the finding of the bill, could give testimony material for his defense, and, therefore, moved the court that the Moffits should be separately tried from the said J. Taylor, the husband of the proposed witness, which was ordered accordingly, and the two Moffits first put upon their trial. The wife of Taylor was then offered as a witness, but was on argument rejected by the court, on the ground that she was the wife of a party, not yet tried, who was jointly indicted with those on trial. And whether the witness was correctly rejected, is the question before the court.

It is true the husband and wife are in general incompetent witnesses, either for or against each other, on the ground, partly of policy and partly of identity of interest. It is well settled moreover, that when the husband is on trial with others, jointly indicted with him, the wife is not a competent witness to testify on behalf of those others, although her testimony may not relate to her husband; because, being brought in conflict with witnesses who testify as to the guilt of all, the tendency of her testimony, under such circumstances, might confer some benefit on her husband, the jury being probably unable to weigh the testimony properly, according to its just bearing on the different defendants. It has also been determined, that the wife of a defendant, jointly indicted with others for a riot, conspiracy, or other offense, in which the guilty participation of some specified number is made necessary by law, is not competent to testify on behalf of the other defendants, although tried separately from her husband, because the consequence of their acquittal in such case might be to exonerate her husband from the charge: See 1 Yerg. 431. But the case before us is neither of these. In this case, the husband has no direct interest in the event of the suit,

nor can the judgment of conviction or acquittal of Moffit be evidence on his trial. He might, therefore, himself, on the separate trial, have been a witness, but for the technical rule mentioned in the case of *The State v. Moody*,¹ Id. 432, "that defendants jointly sued or indicted, can not be witnesses for or against each other, until discharged from the suit or prosecution, or at least, until after conviction." But the wife is not a party, and, therefore, not within the scope of that technical rule. She is not to be excluded on the ground of identity of interest with the husband, because, as has been said, he has no interest. Her admission as a witness does not violate the principles of public policy, founded on the relation of husband and wife, because she is not offered as a witness for or against him. Upon principle, therefore, the wife may be a witness under the circumstances, and in the case stated in the record. But there is no want of express authority upon the very point. In the case of *The Commonwealth v. Eastland*, 1 Mass. 15, it is decided to be a sufficient ground for a separate trial, that the wife of one defendant is a material witness of the other. And in the case of *The State v. John Anthony, sen.*, a new trial was granted by the constitutional court to the defendant, because the wife of the other defendant, jointly indicted for murder, but not on trial with him, had been offered as a witness on his behalf, and rejected by the judge presiding at the trial: 1 McCord, 286.

The judgment, therefore, in the case before us, will be reversed upon the ground stated, and a new trial be granted.

THE PRINCIPAL CASE WAS REFERRED TO WITH APPROVAL in *People v. Labra*, 5 Cal. 185, and *People v. Newberry*, 20 Id. 440.

PETTY v. HANNUM.

[2 HUMPHREYS, 102.]

BILL AGAINST TWO DEFENDANTS TAKEN PRO CONFESSO AGAINST ONE for want of his appearance, will not estop the other from denying or disproving the allegations in the bill.

NOTE GIVEN FOR PURCHASE PRICE OF LAND, TITLE TO WHICH FAILS, is valid in the hands of *bona fide* purchasers, but they can recover only the amount they paid for the note from the maker.

APPEAL from the county court of Stewart county. The opinion states the case.

W. A. Cook, for the complainant.

1. *State v. Mooney*.

W. K. Turner, for the defendant Drane.

By Court, *TUMLEY, J.* The complainant purchased a tract of land from one William B. Nelson, for which he executed his note for the sum of six hundred dollars, due and payable about the first day of July, 1829. This note was assigned by Nelson to the defendants, Hannum and Drane, before it became due, at a discount of one third, or at the rate of sixty-six and two thirds of a cent in the dollar. Nelson had no title to the land, and complainant has been evicted by the true owners. The defendants obtained judgment on the note, and this bill is filed to enjoin its collection. The bill charges, that Hannum and Drane, at the time they purchased the note, had full knowledge of the failure of the consideration. The bill is taken for confessed against Hannum, but Drane answers, and denies explicitly, that, at the time of the purchase, either he or his partner had any knowledge that the consideration of the note had failed, or that they even knew what it purported to have been; he says that after the note fell due, complainant was written to upon the subject of its payment, and that he wrote a letter in reply, which is exhibited, promising to pay and requesting indulgence, which was granted for several months.

It is very obvious from the letters of complainant to the defendants, that he, himself, was not aware of the failure of the consideration of the note, when it fell due, and there can be but little pretense for supposing that either Drane or Hannum could have acquired the information sooner than himself. Drane denies it most positively, and there is no proof to the contrary. But it is contended, that as Hannum has not answered the bill, but permitted it to be taken as confessed, he is thereby fixed with notice, it being charged in the bill, that notice to one co-partner or joint purchaser, is notice to the other, and that Drane is estopped from denying or proving the want of it on his part. To sustain this position would be to do Drane great injustice. This partnership has long since been dissolved, and in distribution of the effects, the note in dispute fell to his share; he has no power to compel his former partner to answer; where he may be, and whether he has ever had actual notice of the filing of the bill, are wholly unknown to the court. Under these circumstances, we say, to hold that a constructive admission of the fact, shall estop his co-defendant, Drane, for urging and proving the truth, would be doing him great injustice.

The question, however, has not been without difficulties; but we have the satisfaction of knowing, that it has been settled

consonant with what, we believe, to be justice, by the court of errors in the state of New York. In the case of *Clason v. Morris*, 10 Johns. 524, it was held, after a laborious investigation, that where a bill in chancery is filed against two defendants, jointly interested, and the bill is taken *pro confesso*, against one for want of appearance, and the other appears and disproves the plaintiff's case, the bill will be dismissed as to both defendants. It is true there was contrariety of opinion among the members of the court, but we think the majority were right, and choose to follow the case. We therefore dismiss the complainant's bill, but will not give a decree for the full amount of the note and interest, but only the amount actually paid by the defendants, namely, sixty-six and two thirds cents in the dollar, with interest thereon from the date of its payment, because we believe that it is only a negotiation of the note in the course of trade for that amount, which we have repeatedly held is the only thing which will protect an indorser of negotiable paper against an equitable defense on the part of the maker, and because, we believe the defendants ought not, in good conscience, to ask to be permitted to make a speculation out of a note situated as this is.

Decree accordingly.

BONA FIDE HOLDERS OF NOTES, RIGHTS OF.—*Bona fide* holders of notes are unaffected by fraud of the prior holder and by equities subsisting between prior parties: *Putnam v. Sullivan*, 3 Am. Dec. 206; *Sims v. Lyles*, 26 Id. 155; *Brush v. Scribner*, 29 Id. 303; *Ridgway v. Farmers' Bank*, 14 Id. 681; *Coddington v. Bay*, 11 Id. 342; as to the rights of a *bona fide* holder of a note made on Sunday, see note to *Coleman v. Henderson*, 12 Id. 292; and for the effect of a note given on a consideration, see *Jones v. Sevier*, 13 Id. 218, and note. As to who is to be deemed a *bona fide* holder, see *Depeau v. Waddington*, *ante*, 216, and cases cited in the note thereto.

PLANTERS' BANK v. WHITE.

[2 HUMPHREYS, 112.]

NOTICE OF PROTEST WILL BIND REPRESENTATIVES of a deceased indorser, though the notice was sent to the indorser, where the notice was addressed to the indorser's late residence, which was a different town, and the notary knew nothing of his death.

APPEAL from the circuit court of Williamson county. The opinion states the case.

Alexander, for the plaintiff in error.

A. Ewing, for the defendant in error.

By Court, GREEN, J. The intestate of the plaintiff in error, Abram M. White, was the first indorser on a note for two thousand one hundred dollars, drawn by Moses P. White, and payable at the Planters' bank the eleventh to the fourteenth of July, 1839, and dated the eleventh of March preceding. A. M. White died the twenty-second of May, 1839, and at the June term following, of the Williamson county court, the plaintiff in error was qualified as his administratrix. The note was protested for non-payment, and notice thereof, addressed to A. M. White, at Franklin, his late residence, was deposited in the post-office at Nashville in due time. The notary public, who gave the notice, knew nothing of the death of White at the time the note fell due, nor is there any evidence that any of the directors of the bank knew this fact. The only question in the case is, whether the notice addressed to the indorser, after his death, is sufficient to fix his representative. There is no doubt but that notice should be given the executor or administrator of a party who is dead: Chit. on Bills, 629. But if there be no executor or administrator, notice sent to the residence of the deceased party's family is sufficient: Chit. 529, note K; and if there be an executor or administrator, but their existence be not known to the holder, notice addressed to the indorser, at the residence of his family, is sufficient: 17 Johns. 25-27.¹

The executor or administrator, having possession of the papers of the deceased indorser, and interested to know the state of his affairs, would take letters addressed to him out of the post-office, and thus, at least, for some months after his death, be as likely to obtain information communicated under his address, as though it had been addressed to the administrator himself. And when we consider the impossibility, that knowledge of the qualification of an administrator should exist at a great distance from the residence of the parties for several months afterwards, it would be absurd to require that notice should be addressed to him, whether this knowledge existed or not. To do so, would be to cripple the circulation of commercial paper, without conferring any benefit upon the estate of the indorser.

In this case the jury have found, under a proper charge of the court, that the holder had no knowledge of the qualification of the administrator. Let the judgment be affirmed.

NOTICE IN CASE OF INDORSER'S DEATH.—If an indorser be dead at the maturity of a note, and executors or administrators, known to the holder, have

1. *Merchants' Bank v. Birch*; 8 Am. Dec. 367.

been appointed, notice of non-payment must be given them, as fully as if the indorser were alive. But where, in ignorance of the indorser's death, notice is sent, sufficient to charge him were he alive, such notice will be good as against his executors or administrators: *Merchants' Bank v. Birch*, 8 Am. Dec. 367.

RUSSELL v. PYLAND.

[2 HUMPHREYS, 181.]

NOTE GIVEN FOR A BET ON AN ELECTION is void.

APPEAL from the circuit court of Marshall county. The opinion states the case.

Meigs and Venable, for the plaintiff in error.

Pillow, for the defendant in error.

By Court, REESE, J. This is an action of debt upon a note, made by the plaintiff in error, and payable to the defendant, for one thousand dollars. Two pleas were filed, which in substance, state that Russell and Pyland, previous to the election for governor of the state of Tennessee in the year 1839, being themselves electors in that election, bet and bargained with each other, upon the result of the election, the said Russell, the sum of one thousand dollars, that Newton Cannon would be elected governor, and the said Pyland the sum of five hundred dollars, that James K. Polk would be elected; and that said note was given in consequence of said bet, and as a security for its payment, if the same should be lost. On the trial, two witnesses proved, that they heard Pyland admit that the note sued on had been bet on the election. Another witness, William S. Anderson, proved that on the day of the election, for governor, in August, 1839, the plaintiff and defendant came to him about twelve o'clock, and placed in his hands the note sued upon, and a note on one Cotley, for five hundred dollars, and told him if Polk was elected governor, that witness was to hand the notes over to Pyland, but that if Cannon was elected governor, to give them to Russell. He proved also, that they were electors in that election.

The bill of exceptions states, that the charge was satisfactory. A verdict was found for the plaintiff, which the court on motion refused to set aside. As the evidence was all on one side, and fully established the truth, in substance, of the pleas, we are unable to perceive the ground on which the verdict was permitted to stand. If it be said in such cases, the parties are *in pari*

delicto, then the defendant, who seeks to set aside a security void on grounds of public policy, and to resist an illegal demand, is in the better condition of the two. In the case of *Allen v. Hearn*, 1 T. R. 56, a wager between voters, with respect to a member of parliament, laid before the poll began, was decided to be illegal, on the grounds, that it was corrupt and against the fundamental principles of the British constitution, that it was a gaming contract not to be encouraged, and of dangerous tendency. And Judge Van Ness, in the case of *Buren v. Richer*, 4 Johns. 435,¹ referring to the above case, very properly observes, "that, if for such reasons, a bet of this description was considered to be void in England, how much is their force increased, when applied to an analogous case in our country, in which the very existence of every department of the government depends upon the free and unbiased exercise of the elective franchise."

We are not left here, however, as in New York, in the case last referred to, and in the case of *Rust v. Gott*, 9 Cow. 169 [18 Am. Dec. 497], to general reasonings of a moral and political character, nor can we, as they, be embarrassed by such questions, as whether the wager took place before or after the election; whether those who wagered were electors or not, or whether they had voted or not. Because our legislature, in 1823, with a wise and prudent forecast, and with an elevation and purity of political morals, worthy of all praise, cut off by the roots, and at one blow, all such distinctions when they declared (c. 23, sec. 2), "that any person or persons who shall make any bet or wager of money, or other valuable thing, upon any election in this state, shall be guilty of a misdemeanor, and upon conviction thereof, on indictment or presentment, shall pay a fine," etc. Here we see a bet, or wager upon an election, is placed upon the footing of actual gaming in other cases. The legislature justly viewed it as a great evil. It may lead to bribery and corruption; but short of that, how revolting it is to witness the mean, sordid, and mercenary motives of the gambler mingling themselves in the exercise of the elective franchise, which should be entirely guided and controlled by a liberal and enlightened patriotism. The note then, in this case, was illegal and void by the principles of common law itself, and the taking and giving it upon a wager, on an election, an indictable offense by the statute. Why, then, should not the verdict be set aside in this court? There is no question of preponderancy in the proof, no weighing of the testimony, no intendment in favor of

1. *Buren v. Richer*, 4 Am. Dec. 292.

the verdict. There is nothing to sustain the verdict, nothing upon which it can stand, and it must, therefore, be set aside, and a new trial granted.

NOTE FOR GAMING CONSIDERATION: See *Jones v. Sevier*, 13 Am. Dec. 218. For a general discussion of the subject of gaming, see note to *State v. Smith*, 33 Id. 132.

MUSE v. DONELSON.

[2 HUMPHREYS, 166.]

AFTER DISSOLUTION PARTNER CAN NOT BIND FIRM by an acknowledgment of a debt, whether the statute of limitations has operated to bar it or not.

R. AND J. MCGREGOR and Donelson were partners in business. The partnership expired in 1834. J. McGregor died and R. McGregor was intrusted with the liquidation of the affairs of the firm. The remaining facts appear from the opinion.

Ready, for the plaintiff in error.

Keeble, *contra*.

By Court, GREEN, J. This suit was brought before a justice of the peace the fifteenth of November, 1839, upon a promissory note executed by the firm of R. McGregor & Co., dated the eleventh of April, 1832. The partnership of R. McGregor & Co. was created in 1829 and expired by limitation in 1834. The justice gave judgment for the plaintiff, and the defendant Donelson, alone, appealed to the circuit court. In the circuit court, the defendant relied on the statute of limitations, and the plaintiff proved, that in 1837, R. McGregor, who was the active member of the firm of R. McGregor & Co., acknowledged said note to be just, and promised the plaintiff to pay the same.

The court charged the jury that "after a partnership had ceased one partner could not make an acknowledgment of a debt and a promise to pay the same, as detailed in the evidence, which would be obligatory on the other members of the firm so as to exclude the statute of limitations. That if such acknowledgment and promise were made, either before or after the statute had performed its office, the effect would be the same. That such acknowledgment and promise would not prevent the statute from running in favor of the other partners, although the debt might not be barred at the time the acknowledgment and promise were made." This charge is correct in all respects. That the acknowledgment and promise of the partner, made

after the dissolution of the partnership, will not take a case out of the statute of limitations, was decided by this court in the case of *Belote v. Wynne*, 7 Yerg. 341;¹ because, say the court, "after a dissolution of a partnership, no partner can create a cause of action against the other partners, except by a new authority communicated to him for that purpose. When the statute of limitations has once run against a debt, the cause of action against the partnership is gone. The acknowledgment, if it is to operate at all, is to create a new cause of action." The case of *Belote v. Wynne* is in accordance with what had been the settled doctrine of this court in regard to the statute of limitations previous to that decision. It was only the application of established principles to the particular case of an acknowledgment by a partner after a dissolution. In the case of *Evans v. Duberry*, 1 Marsh. 189, the court of appeals of Kentucky decided that evidence of the acknowledgment of one partner of the existence of a debt made after the dissolution, was inadmissible against another partner. In the case of *Bell v. Morrison*, 1 Pet. 351, 375, the supreme court of the United States decided, that the acknowledgment of one partner after the dissolution, would not operate to take a case out of the statute of limitations as to other partners.

The opinion of the court in this case, delivered by Judge Story, exhausts the subject and states the principles upon which it rests with great clearness and force. These principles and views were recognized and adopted by this court in the case of *Belote v. Wynne*. With that decision we are entirely satisfied, and reaffirm its principles. But in this case, the counsel for the plaintiff in error takes a distinction between an acknowledgment made after the bar of the statute had been formed and one made before the expiration of the time to form the bar. This distinction can not exist in principle. In *Bell v. Morrison* the court say, "The acknowledgment, if it operate at all, is to create a new cause of action." But in the commencement of the same paragraph, page 373, they say, that "after the dissolution of a partnership, no person can create a cause of action against the other partners, except by a new authority communicated to him for that purpose." If, then, he can create no new cause of action; and if the acknowledgment, to have any efficacy, does create such cause of action, it follows that whether it is made before or after the time limited in the statute has expired, can make no difference: Gow on Part. 310.

Let the judgment be affirmed.

POWER OF PARTNER AFTER DISSOLUTION OF THE FIRM.—As a general rule a partner can not bind his copartners after the dissolution of the firm: *Rootes v. Wellford*, 6 Am. Dec. 510; *Lansing v. Gaine*, 3 Id. 422; *Nott v. Downing*, 26 Id. 491; *Wilson v. Torbert*, 21 Id. 632; *Barringer v. Sneed*, 20 Id. 74; *White v. Union Ins. Co.*, 9 Id. 726. Though if notice of the dissolution has not been given, the acts of one will bind the others: *Price v. Townsey*, 14 Id. 81; *Graves v. Merry*, 16 Id. 471; and it has been held that the acknowledgment of a debt by one partner after the dissolution, will prevent the operation of the statute of limitations as to the others: *McIntire v. Oliver*, 11 Id. 760; *Greenleaf v. Quincy*, 28 Id. 145; *Austin v. Bostwick*, 25 Id. 42; though the contrary was held in *Levy v. Cadet*, 17 Id. 650; and in *Wilson v. Torbert*, 21 Id. 632, it was held that one partner after the dissolution of the firm can not, without express authority, create or revive a debt against his late partners.

GUTHRIE v. OWEN.

[2 HUMPHREYS, 202.]

UNREBUTED WILL, HOW FAR VALID.—Where a will is finished with the exception of the attestation clause and the clause appointing an executor, and the draughtsman leaves and does not return till the next day, when the testator was mentally incapable of finishing it, and fills in these clauses himself, it will be admitted to probate as far as the personality is concerned, it comprising within its scope all the objects of the testator's bounty, and the instrument showing that nothing in the nature of a deduction from or charge upon the bequests would have been added.

WHERE LEGACIES ARE TO BE MADE FROM THE REAL AND PERSONAL PROPERTY in such a case, they will be made from the personality as far as possible, though they will fail as to the realty.

INSTRUCTION THAT PERSONALTY IS LIABLE BEFORE REALTY in payment of a charge in such a case does not tend to mislead the jury, and forms no ground for complaint.

APPEAL from the circuit court of Williamson county. The opinion states the case.

Alexander and Campbell, for the plaintiffs in error.

Marshall, Foster, and Ewing, contra.

By Court, REESE, J. Samuel Owen, in his last illness, and the day before his death, caused one of his neighbors to be sent for, with the purpose of having his last will prepared. He had for some years been unable to speak, but could readily communicate his thoughts by signs to the family, and also to them, and to others, by indicating words in a dictionary. He was in the full possession of his mental faculties. To the draughtsman of the paper propounded as his will, he indicated his wishes in the manner above stated, by pointing to the leading and important words in a dictionary. When the clauses were written in this

manner, they were separately read to him, and he assented to each, and when they were all written he read the entire instrument as far as prepared, himself, and assented to the whole, and this comprised the entire instrument propounded as his will, except the appointment of an executor, and the attestation clause. The process of preparing the instrument was tedious and exhausting, the draughtsman not in good health, and at ten or eleven o'clock at night, having completed the instrument to the point stated, the further progress in it was suspended. Business required the draughtsman to leave early in the morning, but he promised the deceased to return in the evening to finish the matter; he did then return, but Samuel Owen was then out of his mind, and incapable of transacting business, and shortly after died. In the course of drawing up the paper, the draughtsman had learned from the deceased, that he wished James C. Owen to be his executor, and he, therefore, added the clause appointing him to that office, and the attestation clause. The paper propounded as the will of Samuel Owen, is as follows:

"I, Samuel Owen, do make and publish this my last will and testament, hereby revoking and making void all other wills by me at any time made. First. I direct that my just debts be paid, as soon after my death as possible, out of any moneys I may die possessed of, or may come into the hands of my executor. Secondly. I give and bequeath to my brother, James C. Owen, my boy Stephen, my carriage, my gold watch, my young gray horse by Sir William, also one thousand dollars of turnpike stock, to wit, twenty shares in the Harpeth turnpike. Thirdly. I give and bequeath to my niece, Narcissa Robert Owen, my bed, my sorrel filly by Pacific, also one thousand dollars of turnpike stock, to wit, twenty shares in the Harpeth turnpike. It is also my will, that James C. Owen hold the above named items as agent for the above named Narcissa R. Owen, and use it as agent for her benefit, and in the event of her decease, without issue, it is my will that the said James C. Owen shall have said property. Fourthly. I give to my brother, James C. Owen, for the benefit of my three nephews, Burnett H. Beasley, Charles C. Beasley, and Felix O. Beasley, and I hereby constitute and appoint him agent, to hold, to use, and disburse for their (the said Beasleys') benefit, the following items, to wit, one thousand dollars in turnpike stock, to wit, twenty shares in the Harpeth turnpike. Fifthly. I will and bequeath my executor sell my land lying on Mill creek, also my negro man Tom, also my land in Warren and Cannon counties, to wit, my interest in these lands. I will

to be sold also, all other property, of whatsoever description, of which I may die possessed of, and the proceeds of which, together with the moneys in my possession at the time of my decease, also the money due to me by bonds or accounts, when collected to be appropriated as above bequeathed. If any surplus should remain in the hands of my executor—my desire is, that Tom should select himself a home, and be sold privately for a moderate price. Sixthly. I leave in the hands of my executor, of the money due me and to be raised as above directed, one hundred dollars for erecting tombs, and fifty dollars for fencing graveyard." (I do hereby nominate and appoint James C. Owen my executor. In testimony whereof, I do, to this my last will, set my hand and seal, this twentieth October, 1838. Signed, sealed, and published in our presence, and we have subscribed our names hereto, this twentieth day of October, 1838. Ferdinand Moore, Everett Owen.)

The above paper, except as to the latter portion of it, inclosed in brackets, containing the appointment of an executor, and an attestation clause, and except, also, as to the real estate, was found by the jury in the circuit court, to be the last will and testament of Samuel Owen. Guthrie and wife, by their counsel, moved for a new trial, which being refused, they have prosecuted their writ of error to this court.

The correctness of the charge of the court, set forth in the record, has been but slightly questioned in the argument here, except in one particular, which we shall hereafter indicate. The argument of counsel has turned mainly upon the facts and circumstances attending the drawing up of the paper propounded, upon the state in which it was left, and the bequests contained in it. The instrument is unexecuted, and so far merely as relates to the appointment of an executor, and a clause of attestation, it is imperfect. It has not been controverted, that a paper unexecuted, and, in some instances, an imperfect paper may be set up as a testament, where the want of execution, or its being imperfect has been produced, not by abandonment, or change of purpose, on the part of testator, but by the act of God, that is, by extreme illness, mental alienation, sudden death, etc., if the paper, as far as it goes, express the will of the deceased, continuing to the time of his death, and if upon the face of the instrument it can be seen that the legacies given to the objects of testator's bounty, and the benefits conferred, would not, if the will had been finished, have been burdened with charges in favor of others: in short, if it express his whole will as far as it goes.

The paper before us, was prepared slowly and with great deliberation, and under circumstances which made it more than ordinarily the work of the testator himself. It was nearly finished; it probably comprised in its scope, all the objects of testator's bounty, and the frame of the instrument, the nature of the bequests, and the powers conferred in order to raise the money to pay the legacies, make it manifest, that if anything had been added, it would not have been in the nature of a deduction from the legacies, or a charge or burden upon them. The manner in which the will was made, the deliberation and sanction of it, as a whole, the circumstances which suspended its progress to a full completion, and the brief interval which elapsed before testator became unable to complete it, repel the notion of any change of purpose, and warranted the jury in arriving at the conclusion, that it contained his will to the time of his death. We think this instrument is sustained by the principles so distinctly announced by Sir John Nichol, in the case of *Montefiore v. Montefiore*, 2 Eng. Ecc. 342, a case on which the circuit court in its charge to the jury, and the counsel on both sides, seem to have much relied. The learned and able judge in that case, observes, "that the legal principles, as to testamentary papers of every description, vary much as to the stage of maturity, at which those papers have arrived. The presumption of law, indeed, is against every testamentary paper not actually executed by the testator. But if the paper be complete in all other respects, that presumption is slight and feeble, and one comparatively easily repelled. But where a paper is unfinished, as well as unexecuted (especially where it is just begun, and contains only a few clauses or bequests), not only must its being unfinished and unexecuted be accounted for, but it must also be proved (for the court will not presume it) to express the testator's intentions, in order to repel the legal presumption against its validity. It must be clearly made to appear, upon a just view of all the facts and circumstances of the case, that the deceased had come to a final resolution respecting it as far as it goes, so that, by establishing it, even in such its imperfect state, the court will give effect to, and not thwart or defeat, the testator's real wishes and intentions, in respect to the property which it purports to bequeath, in order to entitle such a paper to probate, in any case, in my opinion."

In the many cases referred to, or existing on this subject, there is, perhaps, none which contains language or announces a principle subjecting papers of this description to a severer

test, when propounded for probate. Yet, the case before us, is so made out, we think, as to abide that test. The chief argument, however, against the validity of the instrument upon the record, offered to us here, attempts to seek its support in the principle stated, that the court must see to it, that in establishing such unfinished paper, they give effect to, not thwart and defeat, the real wishes and purposes of the deceased. For it is said, his will was, that his land should be sold; and you can not, therefore, give effect to the entire wish of the testator. But this is a mistaken view of the matter. The real wishes and purposes of the deceased, referred to by Sir John Nichol, relate to the objects of testator's bounty, who, if the will had been finished, might have been brought forward to participate in some measure in the bequests given to those named. If the real as well as the personal estate be given to the same objects of the testator's bounty, or the real estate be directed to be sold to pay legacies to them, and the paper is not so finished and so executed as to pass real estate, you can not be said to thwart and defeat the real wishes of the testator, if you give to the objects of his bounty, all you can, the personal estate. To refuse to do that, because you can not give effect to his entire wishes in their behalf, nor make his bounty so ample, as he intended, would be to thwart and defeat, not to give effect to the sense and meaning of Sir John Nichol. If, indeed, in an unexecuted instrument, personal property be given to A., and real to B., and from sudden death, the testator can not finish the instrument so that the land can not pass, it might be doubtful, whether in such a case, if the will were set up, as to the personal property, the real wishes of the testator, if he could have foreseen such a state of things, would not be defeated thereby. But here the land is to be sold to pay the money legacies, for it is in proof, that the testator had not turnpike stock, and, therefore, meant the money legacies to be so invested. What the court says, in its charge to the jury on the subject of the course of a court of chancery, where a charge is made on both real and personal property, that the latter must be first sold and exhausted before the former can be called in aid, is admitted by the counsel of plaintiffs to be correct, but is alleged to have been misplaced and irrelevant, and calculated to mislead the jury. We do not perceive the ground on which the plaintiffs in error can complain of that part of the charge, nor how, if it were held to be irrelevant, it could have misled the jury.

Upon the whole, we think, there is nothing which on grounds

of law or fact, ought to disturb the verdict and judgment which have been rendered in the case, and we, therefore, affirm them.

UNESEXECUTED WILL, HOW FAR VALID.—By the ecclesiastical law, no particular form was required in drawing a will of personalty. Such a will written in the testator's own hand, though it had neither his name nor seal attached, was good, provided sufficient proof could be had that it was his handwriting; and though the writing was in another man's hand, and never signed by the testator, yet if proved to be according to his instructions and approved by him, it was held a good testamentary disposition of personal estate: 2 Bl. Com., sec. 502. This was not the rule in regard to realty. By the common law, no lands or tenements were devisable by any last will or testament, the true reason seeming to be from the nature of the feudal tenure and the relation that was established between the landlord and tenant; the tenant being allowed by no act to dispose of the feud so as to defeat the lord of the advantage of his seignory, and hence he could not devise it even to his own heir. The statute of 32 Henry VIII., c. 1, usually called the statute of wills, enacted that persons having manors or lands should have the power of disposing of such by will, and the statute of frauds, 29 Car. II., c. 3, sec. 5, further provided that all devises and bequests of lands or tenements devisable by the statute of wills, should be in writing and signed by the party devising the same, or some other person in his presence, and by his express direction, and should be attested and subscribed in the presence of said devisee by three or four credible witnesses, or else should be utterly void and of no effect: 5 Bac. Abr., tit. Wills and Testaments, D, 502. The statute of Charles, being explicit in its requirements, has given rise to little controversy. The principal questions have involved the construction of papers bequeathing personal property.

Where a paper is in the handwriting of the testator, without date or signature, it is valid if it is shown that the testator intended to have it operate in its present form: *Read v. Phillips*, 2 Phillim. 122; *Friswell v. Moore*, 3 Id. 135; so where a will had been copied and the testator had delayed its execution for two months, it will be admitted to probate where it is shown that it had received the testator's approval, and that the delay had merely proceeded from habits of procrastination, the testator having at last died suddenly from apoplexy: *Warburton v. Burrows*, 1 Add. 383. So a will made by interrogatories, though not executed, is valid; death having prevented the execution: *Green v. Skipworth*, 1 Phillim. 53. And a codicil unsigned and having an attestation clause unattested by witnesses, was probated, the testator having intended the codicil to operate, but being prevented from signing by bodily weakness: *Thomas v. Wall*, 3 Id. 23. And a will with a testimonium clause, without a signature and having a blank to the date, was admitted, the intention having continued: *In re Francis Lamb*, 4 Notes of Cases, 561; and if the intention of the testator is clear, and he is prevented from executing the will on account of duress, it is a valid testamentary disposition: *L'Huillie v. Wood*, 2 Lee's Ecc. Cas. 22; or where the execution is prevented by a sudden incapacity, superinduced by the violent conduct of his wife, who was interested in thwarting his intent: *Lamkin v. Babb*, 1 Id. 1. Supervening insanity is sufficient to account for the non-execution of a paper written shortly before and consistent with the intent and affections of the deceased: *Hoby v. Hoby*, 1 Hagg. Ecc. 146; and generally where the execution is prevented by an act of God, the instrument will be admitted to probate: *Scott v. Rhodes*, 1 Phillim. 12; *In re James Taylor*, 1 Hagg. Ecc. 641; *Masterman v. Maberly*, 2 Id. 235.

Instructions for a will have sometimes been admitted to probate; as where the instructions were in conformity with the testator's intentions, and death prevented a more formal execution: *Castle v. Torre*, 2 Moo. P. C. 133; *Goodman v. Goodman*, 2 Lee's Ecc. 109; *In re Bathgate*, 1 Hagg. Ecc. 67; and where instructions for a codicil were given to a third person who was to transmit them to a solicitor, they were held valid, the solicitor intending to have the codicil read over and executed, and this being prevented on account of the incapacity of the deceased: *Lewis v. Lewis*, 3 Phillim. 109. And a will drawn according to instructions, which was never seen or read by the testator, is valid if the testator was prevented from executing it by an act of God, and the instructions expressed his intent: *Sikes v. Snarth*, 2 Id. 351; *In re Bathgate*, 1 Hagg. Ecc. 67; and instructions neither signed by the testator nor read over to him, but clearly proved to have been in conformity with his intentions, were admitted to probate: *Robinson v. Chamberlayne*, 2 Lee's Ecc. 129. A party being taken ill went to Tunbridge Wells for the purpose of obtaining the assistance of his solicitor in making his will; he told the solicitor that he had the whole of the will in his own mind and that he wanted him to write it down from his own mouth. He dictated a portion of his intentions, and several days after dictated the remainder; the whole was contained on three pieces of paper. They were read to him and approved; the solicitor having had a copy of them made, repaired to the deceased's house next morning to have it executed, but the testator was rendered incapable by a fit, from the effects of which he died; the instructions were held a good will: *Huntington v. Huntington*, 2 Phillim. 213. A testator made a will to please his wife; then a second (unknown to the wife) to please himself; some time after he went to his attorney and gave him instructions for a third will, telling him at the same time that he was that day going to make a codicil to (and so in effect revive) the first, terming it his wife's will, but would come the next day, and execute the third, which he meant to be his will, expressly to defeat the first. He revived the first accordingly, but died without executing the third. The court held that upon the evidence, he was prevented by an act of God, and admitted a draft will which had been prepared from instructions so given by the testator: *Allen v. Manning*, 2 Add. 490. But the presumption of the law is against the validity of a testamentary paper not completed: *Wood v. Medley*, 1 Hagg. Ecc. 645; *Reay v. Cowcher*, 2 Id. 249; *Beatty v. Beatty*, 1 Add. 154; *Montefiore v. Montefiore*, 2 Id. 354. The evidence required to establish such a paper varies as it approaches completion. Thus if a writing is in the testator's hand, and there is an attestation clause unattested by witnesses, the court is bound to presume that the testator intended to do something further in relation to it: *Harris v. Bedford*, 2 Phillim. 177; *Stewart v. Stewart*, 2 Moo. P. C. 193; but this presumption is slight and easily overcome: *Beatty v. Beatty*, 1 Add. 154; *Doker v. Goff*, 2 Id. 42. But where the instrument offered for probate was a pencil memorandum written by, and in the pocket-book of the person who produced it, but sworn to have been written down from the instructions of the deceased, at a single interview, three days before his sudden death, by apoplexy, not signed, nor ever seen or afterwards referred to by the deceased, nor led up to or confirmed by the conduct, declarations, or affections, but resting solely on the evidence of the writer, the court said the presumption against such an instrument was very strong, and that the party setting it up must show first that the intention of the testator to have the instrument operate was fixed as final; and second, that he was prevented from completing it by the act of God. These things not having been shown, the instrument was rejected: *Theakston v. Marson*, 4 Hagg. Ecc. 290. In any case the final intention of the testator must be shown to be contained

in the instrument or it will not be admitted: *Beatty v. Beatty*, 1 Add. 154; *Roose v. Mouldale*, Id. 129; *Walker v. Walker*, 1 Meriv. 503; *In re Robinson*, 1 Hagg. Ecc. 643; *In re Herne*, Id. 222; *Briggs v. Dyer*, 3 Id. 207; *Elsden v. Elsden*, 4 Id. 183; *Gillow v. Bourne*, Id. 192; *Thankston v. Marson*, Id. 290; *Abbot v. Peters*, Id. 380.

In the United States, the earlier cases followed the ecclesiastical law. Thus no particular form was required in a will of personalty: *Jones v. Kea*, 4 Dev. L. 301; *McLean v. McLean*, 6 Humph. 452. It was not necessary that it should be witnessed, or written, or signed by the testator; it was sufficient if drawn up according to his directions and approved by him: *Frierson v. Beall*, 7 Ga. 438; *McLean v. McLean*, 6 Humph. 452. An instrument which was proved to contain the wishes of the testator as to the disposal of his property, but which he was prevented from signing, attesting, or publishing by a sudden visitation of God, is valid as to the personalty, though some short time passed between the time when it was in his power to execute it and the incapacity, if the delay was from convenience and not from hesitancy: *Gaskins v. Gaskins*, 3 Ired. L. 158. A testamentary paper was found in an iron chest among the valuable papers of a deceased person; it was without signature, and had an attestation clause without witnesses; it was written by the deceased with his name in the beginning, in a fair hand, engrossed on conveying paper with a seal attached thereto, and evinced deliberation and foresight in its provisions, disposing of a large amount of real and personal property. The executors named in the testamentary paper claimed probate thereof, which was allowed by the surrogate as to the personalty. The chancellor reversed the decision of the surrogate, but on an appeal from chancery to the court of errors, the decision of the surrogate was affirmed: *Watts v. Public Administrator*, 4 Wend. 168; and wills of both real and personal property, though not executed formally enough to pass the real estate, may still be valid as to the personalty: *Nutt v. Nutt*, 1 Freem. Ch. 128; *Ex parte Henry*, 24 Ala. 638; *Devecmon v. Devecmon*, 43 Md. 335; and where a codicil in the handwriting of a testator reciting the changes and alterations he intended to make in it as to the personal property was found with his will, it was held a good and valid testamentary disposition, though not signed nor attested: *Brown v. Tilden*, 5 Har. & J. 371; and a paper, intended merely as instructions, or a memorandum to enable the scrivener to prepare the will, will be admitted to probate where the more formal part is left unfinished by an act of God: *Boofster v. Rogers*, 9 Gill, 44. So instructions not good as a written will have been held valid as a nuncupative will: *Parkison v. Parkison*, 12 Smed. & M. 672; *Phabe v. Boggess*, 1 Gratt. 129; *Mason v. Duman*, 1 Munf. 456. And that a paper writing, propounded as a will, has upon it an attesting clause unwitnessed, will not prevent its being established as a holographic will: *Hill v. Bell*, Phil. L. (N. C.) 122; nor is it any objection to the probate of a will as a holograph that it has but one subscribing witness, and was intended by the deceased to be proved by subscribing witnesses, his intention being frustrated by the incompetency of the second attesting witness: *Brown v. Beaver*, 3 Jones, 516; as under the ecclesiastical law, the presumption is against every testamentary paper not completed: *Frierson v. Beall*, 7 Ga. 348; as where a will contained an attesting clause to which there were no signatures: *Plater v. Groome*, 3 Md. 134; *Jones v. Kea*, 4 Dev. L. 301; *Ex parte Henry*, 24 Ala. 638. And the intention of the testator must continue: *Boofster v. Rogers*, 9 Gill, 44; *Selden v. Coalter*, Va. Cas. 553; *Brown v. Shand*, 1 McCord, 409; *Public Administrator v. Watts*, 1 Paige's Ch. 347.

The decisions that have been cited were all made when the law drew a

distinction between wills of real and wills of personal property. In England and most of the United States, the distinction has been abolished by statute, and the same formality required for wills of personal estate as are required for those of real property. The statute of 1 Vict., c. 26, sec. 39, provides: "That no will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned; that is to say, it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary." This statute was subsequently modified by the act of 15 and 16 Vict., c. 26, in so far as the place of the signature was concerned; which enacted that the signature should be valid if "so placed at, or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect, by such his signature, to the writing signed as his will." The statutes in the American states require substantially the same formalities as the act of 1 Vict. The effect of these acts has been the same in both countries. The courts have held that all the formalities required must be complied with; but an exact compliance is not necessary, a substantial one is sufficient: *Torry v. Bowen*, 15 Barb. 304; *McDonough v. Loughlin*, 20 Id. 238; *Peck v. Cary*, 38 Id. 77; *Nelson v. McGiffert*, 3 Barb. Ch. 158. Among the papers of the testator two letters, sealed, were found, directed: "For S. G., my late servant." These letters contained promissory notes for a large sum of money; one letter stated that the testator inclosed two hundred pounds as a mark of respect, the other that the inclosed was for her long and faithful service. S. G. applied to the executors for the payment of the notes; the court held that an action was not maintainable upon them, as they were in fact a legacy which was informal and void under 1 Vict.: *Gough v. Fendon*, 7 Exch. 48. The signature of the testator must be written before the witnesses sign their names, and if written after, the instrument is not duly executed, and is void: *Sisters of Charity v. Kelly*, 67 N. Y. 409. Under the Pennsylvania statute, it was decided that a will was valid, though not signed, the testator being prevented by his sickness from either signing himself or directing others to sign for him, the will being otherwise established: *Showers v. Showers*, 27 Pa. St. 485.

There must be a plain and unequivocal acknowledgment of his signature by the testator; without it the instrument is of no effect. Thus where a testator at the time of the alleged execution of his will, in the presence of the attesting witnesses, placed his finger on his name subscribed at the end of the will and acknowledged that it was his last will and testament, but there was no evidence that he subscribed it in the presence of the attesting witnesses, or that he acknowledged in their presence that the subscription was made by him or by his direction or in his presence, the instrument was not admitted to probate on account of a want of due execution: *Chaffee v. Baptist Miss. Unv.*, 10 Paige's Ch. 85. So where the alleged will was not signed in the presence of the witnesses, and when they signed their names, it was so folded that they could not see whether it was subscribed by him or not; and the only acknowledgment made was by his saying, "I declare the within to be my will and deed," it was held not a sufficient acknowledgment within the statute, and probate of it was refused: *Lewis v. Lewis*, 11 N. Y. 220. Allen, J., at page 226 of the opinion, said: "It [the instrument] must be declared to be his last will and testament by some assertion or some clear assent in words or signs, and the declaration must be unequivocal. The policy and object of the

statute require this, and nothing short of this will prevent the mischief and fraud which were designed to be reached by it. It will not suffice that the witnesses have elsewhere and from other sources learned that the document which they are called to attest is a will, or that they suspect or infer from the circumstances and occasion that such is the character of the paper. That fact must in some manner, although no particular form of words is required, be declared by the testator in their presence, that they may not only know that fact, but that they may know it from him, and that he understands it, and at the time of its execution, which includes publication, designs to give effect to it as his will, and to this, among other things, they are required by statute to attest." And it is a fatal objection to the validity of a will if one of the witnesses neither saw the testator subscribe nor heard him acknowledge his signature: *Rutherford v. Rutherford*, 1 Denio, 33; *Killick, in the goods of*, 3 Sw. & Tr. 578.

The testator must, in the presence of the witnesses, declare the instrument to be his last will and testament. It is not sufficient if he makes such declaration in the presence of one witness and signs it in the presence of two who subscribe as witnesses at his request: *Seymour v. Van Wyck*, 6 N. Y. 120. And merely signing the instrument and acknowledging it to be her hand and seal for the purposes therein mentioned, without its being read to her or any declaration being made by her that it was her will, or by any other person and assented to by her, is not sufficient to entitle the instrument to probate: *Remsen v. Brinckerhoff*, 26 Wend. 325. The mere fact of the deceased's asking witnesses to sign their names to a paper will not entitle an instrument to probate, when he did not execute the paper in their presence nor acknowledge it as his will, and when they subscribed the paper they could not see any writing: *Thomas Pearsons, in the goods of*, 10 Jur. (N. S.) 372; *Hott v. Genge*, 4 Moo. P. C. 265. The deceased must have referred to the instrument as his will: *Swinford, in the goods of*, L. R., 1 Per. & Dav. 630. Where a subscribing witness to a will testified that she saw the deceased sign his name at the end of the paper; that he said he wanted her to sign her name and she did so in his presence, but did not hear him say that it was his last will and testament, the instrument is not a valid will: *Trustees of Auburn Theol. Sem. v. Calhoun*, 62 Barb. 381. But the publication may be made in any form of communication to the witnesses, whereby the testator makes known to them that he intends the instrument to take effect as his will; thus where one of the witnesses in the presence and hearing of the other, whose attendance was by the testator's procurement, asked the testator, "Do you request me to sign this as your will as a witness?" and the testator said "yes," it was sufficient as a request to both witnesses and as a publication: *Coffin v. Coffin*, 23 N. Y. 9.

THE ATTESTING WITNESSES MUST SIGN IN THE PRESENCE OF THE TESTATOR. So where the attesting witnesses retired from the room where the testator had signed, and subscribed their names in the adjoining room, and the jury found that from one part of the room a party, by inclining himself forward, with head out at the door, might have seen the witnesses, but that the testator was not in such a situation in the room that he might, by so inclining, have seen them, the will was held not duly executed, and probate was refused: *Doe d. Wright v. Manifold*, 1 Mau. & Sel. 294. So where a testatrix was sick in bed in one room, and the witnesses to a codicil retired to the next room to sign, the attestation was invalid, though the doors between the rooms were open, and the testatrix, by raising herself in bed, could have seen the witnesses sign, there being no evidence that she did so raise herself: *Killick, in the goods of*, 3 Sw. & Tr. 578; and even where the attesting witnesses signed in the same

room, an attestation was held invalid, as not being in the testatrix's presence, where the evidence showed that she lay in bed with the curtains closed and her back to the attesting witnesses, and was utterly unable to turn herself so as to draw aside the curtains: *Tribe v. Tribe*, 1 Robt. Ecc. 775; though had she been able to turn and draw aside the curtains, it would have been a sufficient signing in her presence: *Newton v. Clarke*, 2 Curt. Ecc. 320. To make a valid subscription, there must be either the name of the witness or some mark intended to represent it; a correction of an error in a previous writing of his name, or his acknowledgment of it, is not sufficient. So where a witness whose name consisted of four words, the first of which began with an F, signed in the presence of the testator, but accidentally left his first initial letter uncrossed, so that it stood as if it was a T, and afterwards advised the testator that there ought to be two witnesses, and on the same day, in the presence of the other witness, after the testator had acknowledged his signature in presence of both, he corrected the mistake, by crossing the T, the court held it not to be a valid attestation: *Hindmarsh v. Charlton*, 8 H. L. Cas. 160. The reason of this decision was, that the testator must acknowledge his signature in the presence of two or more witnesses, whose signatures are to follow the acknowledgment; and that the crossing of the T by the witness, though an acknowledgment of his former signature, was yet not sufficient to satisfy the statute. Where one of the attesting witnesses, by desire of the testator, subscribed her husband's name instead of her own, the attestation is invalid: *Pryor v. Pryor*, 29 L. J., pt. 3, p. 115. Nor would an act of God do away with the necessity of the attestation; thus, in the case of *Vernam v. Spencer*, 2 Bradf. Surr. 16, a testator having determined to modify a previous will, the instrument, prepared conformably to his instructions, was placed before him for execution; in the presence of two witnesses attending at his request, he signed it at the foot, and was seized with death as he was in the act of signing in the margin. The surrogate refused to allow probate of the will, on account of the want of attestation. In the course of his opinion he said: "To the due execution of a will several ceremonial parts are necessary, and one just as necessary as another. There is no will until they are all completed. The absence of any one ceremony destroys the unity. These ceremonies are acts. The mere intention to have them all performed is not sufficient, but the intention must be effectuated in fact. If accident intervene to prevent their performance, the intention can not be taken in lieu of performance or instead of the act."

Cases have arisen where the signature was detached from the rest of the will; being either on a different sheet, or on another side of the same sheet. Thus in *Lambert, in the goods of*, 8 Jur. (N. S.) 158, all the body of a will was written on one sheet of paper, and the deceased's signature, the attesting clause and the signatures of the attesting witnesses were on a separate piece, which was attached to the other by wafers; probate of this instrument was refused, the court saying that they did not think the act of 15 and 16 Vict., above referred to, authorized the signature of the testator being on a separate piece of paper. In *West, in the goods of*, 9 Jur. (N. S.) 1158, and *Hammond, in the goods of*, 3 Sw. & Tr. 90, the facts were similar, and probate of the wills was also refused, though in those cases the court based their decisions on the fact that there was no evidence that the papers were properly executed and in the same state at the time of the death as when the testator signed them. But in *Gansden, in the goods of*, 2 Id. 362, a will was held valid, though written on a piece of parchment and the testator and witnesses signed their names to a piece of paper previously pasted on the parchment. So where a will ended in the middle of a third page of a sheet of foolscap, the lower half

of the page being left blank, and the attesting clause and signatures being written on the top of the fourth page, it was held validly executed: *Hunt v. Hunt*, L. R., 1 Prob. & Div. 209. But if the court is satisfied that the signatures on the succeeding page were not placed there for the purpose of attesting the will, probate will be refused: *Wilson, in the goods of*, L. R., 1 Prob. & Div. 269. And in *Sweetland v. Sweetland*, 4 Sw. & Tr. 6, a decedent signed his name on five sheets of a testamentary paper which consisted of six sheets; the sixth sheet containing a testimonium and an attestation clause and the names of the witnesses, but not the signature of the deceased; the writing on the fifth sheet broke off in the middle of a sentence, which was continued on the sixth sheet; the court refused to grant probate of the five sheets as containing the last will and testament of the deceased.

The foregoing cases show conclusively that, to be valid, a will must conform substantially to all the statutory requirements; that anything short of this, will render it invalid and absolutely of no effect.

JOHNSON v. STATE.

[2 HUMPHREYS, 283.]

IN CHASTISING CHILDREN, PARENT MUST BE CAREFUL not to exceed the bounds of moderation, and inflict cruel and merciless punishment; if he does so, he is a trespasser.

WHAT IS AN EXCESS OF PUNISHMENT, is a question of fact for the jury.

CHARGE MAKING WHAT CONSTITUTES EXCESS OF PUNISHMENT a legal conclusion, instead of a question of fact, is erroneous.

THE opinion states the case.

By Court, TURLEY, J. The right of parents to chastise their refractory and disobedient children, is so necessary to the government of families and to the good order of society, that no moralist or law-giver has ever thought of interfering with its existence, or of calling upon them to account for the manner of its exercise upon light or frivolous pretenses. But at the same time that the law has created and preserved this right, in its regard for the safety of the child it has prescribed bounds beyond which it shall not be carried. In chastising a child, the parent must be careful that he does not exceed the bounds of moderation, and inflict cruel and merciless punishment; if he do, he is a trespasser, and liable to be punished by indictment. It is not, then, the infliction of punishment, but the excess which constitutes the offense, and what this excess shall be, is not a conclusion of law, but a question of fact for the determination of the jury.

Bearing in mind this principle, let us examine the charge of the court below, and see whether this case has been properly submitted to the jury. The judge said: "If the jury believed

that the defendants took hold of the child, and one of them struck the child with her fists, and pushed her head against the wall, and then led her off to another house, and with a stick or switch struck her, as she was led along, and that the defendants took the child into a room and tied her to a bed-post with a rope, and kept her tied there for two hours or even half an hour, and in that situation whipped her with a cowskin at different intervals, as described by witnesses, it would clearly exceed moderation and reason, and would be barbarous in the extreme." Now, under this charge, what was left for the consideration of the jury? Surely nothing but the credibility of the witnesses. They were told, if they believed them, then there was excess of punishment. Now, is not this making what constitutes excess of punishment a legal conclusion, instead of a question of fact, or is it not charging the jury upon the fact? Unquestionably it is. By the constitution of this state, judges are permitted to state the testimony, and declare the law; but they are prohibited from instructing the jury upon the weight of the testimony, or as to the conclusion, to which it must bring their minds. This is peculiarly the province of the jury itself, and constitutes the very purposes for which it is made to form a part of our judicial system. In this case the judge should have said to the jury, if you believe the facts (stating them) as proven by the witnesses, and in your opinion, they constitute excess of punishment, then the law pronounces the defendants guilty. This would have been keeping the power of the court and jury within their proper sphere. But when the court told the jury what the result of the facts proven (if true) would be, a power was exercised not given by law, and a verdict given under the charge can not be sustained.

We are therefore of the opinion that the judgment in this case be reversed, and the cause remanded for a new trial.

THE PRINCIPAL CASE WAS APPROVED in *Claxton v. State*, 5 Humph. 184; and in *Fletcher v. People*, 52 Ill. 397.

CASES
IN THE
SUPREME COURT
OF
VERMONT.

FLETCHER v. BRADLEY.

[13 VERMONT, 22.]

EXECUTION MAY BE LEVIED ON THE DAY ON WHICH IT IS RETURNABLE, and a commitment thereon is valid.

SHERIFF HAVING AN EXECUTION IN HIS HANDS, and a reasonable opportunity presenting itself to execute it by a commitment of the debtor's body, must do so.

FAILURE TO RETURN AN EXECUTION within the time commanded, after complete service of the same, without proof of actual loss, will not entitle a judgment creditor to an action on the case against the sheriff.

SHERIFF ACTING UNDER SPECIAL INSTRUCTIONS, giving him a discretion in the enforcement of a writ, is not liable for the exercise of such discretion.

TRESPASS on the case against a sheriff for failing to levy, serve, and return an execution issued by plaintiffs on a judgment recovered against one Kinney. The execution was delivered to the sheriff on the seventeenth of September, 1838, returned on the twenty-sixth of October following, with an indorsement thereon that the debtor was, on the thirteenth of that same month, committed to jail. Kinney had taken the benefit of the poor debtor's act, and had been discharged. Defendant proved that plaintiffs had given him instructions to act at his discretion in managing the execution. Defendant had judgment.

F. G. Hill and Charles Adams, for the plaintiffs.

Maeck and Smalley, for the defendant.

By Court, **BENNETT, J.** The evidence in this case shows that Kinney was committed to jail on the execution in its life-time,

though the execution was not, in fact, returned into the office from which it issued till shortly after its expiration. In the case of *Turner v. Lowry*, 2 Aik. 73, it was decided, that to charge bail on mesne process, it was necessary that the officer should return the execution into the proper office within the "sixty days," with his return of *non est inventus* indorsed thereon; and that, if he failed so to do, he was liable for such neglect. This case is relied upon as authority to sustain the present case; but, are the cases analogous? The law allows a writ of execution to be executed on the day on which it is returnable; and, consequently, the commitment in this case is valid, and the plaintiffs have had the full benefit of their execution. While the body of the debtor remains in execution, there can be no ulterior proceedings, and the return of the execution within the "sixty days" is in no way essential to perfect any of the rights of the creditor growing out of its service. If the officer, having the execution in his hands, see the debtor, and has a reasonable opportunity to execute it, in its life-time, by the commitment of the body, it is his duty so to do. In the case of *Palmer v. Potter*, Cro. Eliz. 512, it was held that a return of "*nulla bona*," made before the return day of the writ, was void, on the ground that, though the debtor may not, at the time, have any goods, yet he may have at the return day of the process.

In *Hoe's case*, 5 Co. 90, 91, it is held, that if the sheriff, by force of a writ of *feri facias*, levies the debt, and delivers it to the party, the execution is good without a return of the writ. The levying of the debt was lawful, and well done, and the defendant could not resist the sheriff in making the levy, and the effect of the authority, which the sheriff had by force of the *feri facias*, was executed; and the creditor had the full benefit of it. It is said, in that case, that the words in the writ, requiring the sheriff to make return thereof, are but words of command to the sheriff to make return, which if he do not, he shall be amoved; but yet the execution shall stand in force. In *Fulwood's case*, 4 Id. 67, it is held, that the service of a *capias ad satisfaciendum* is good, though not returned. The same is the case as to writs of seisin and possession; and, generally, as to all writs of execution, which are the most final process known to the law, and after which no judgment is to be given, or further process had. Dalton's Sher. 179, 180, is to the same effect. By our laws, many executions are required to be executed and returned within the life of them. Where an execution is levied upon land, the execution and officer's return must be recorded

in the registry of deeds and in the office from which the execution issued, within its life, to perfect the title acquired under such levy. And should an officer levy an execution on lands, within its life, and omit making his return and having it recorded until after the time limited for so doing had expired, such levy would be of no avail whatever to the creditor.

This is not at all inconsistent with the general rule, that, where the creditor has had the full benefit of a complete execution of the process, which the sheriff was empowered to execute, he, at least, has no reason to complain of the execution not being returned into the proper office within the time commanded. Our statute provides, it is true, that most of our writs of execution shall issue and be made returnable within sixty days, and our officers, by another statute, are required to receive, execute, and return the same agreeably to the directions therein given; but it is a *non sequitur*, that the creditor can have his action on the case against the officer for the omission to make return of the execution within the time commanded, in a case where the creditor has had the full benefit of a complete service of the execution. If the officer willfully refused to make return of an execution according to the command therein contained, he might probably be amoved for contempt upon common principles, and our statute, page 208, provides, that, upon conviction thereof, he shall pay a fine not exceeding one hundred dollars. It also provides that he shall pay to the party aggrieved all damages thereby sustained to be recovered in an action on the statute. To give the party a remedy on this statute he must have been damnified. If the writ of execution has been executed but in part, a return of the execution may be necessary to enable the creditor to take his *alias* execution for the balance. So it may be necessary to enable the creditor to take an *alias* against the goods, chattels, and estate of the debtor, where his body has been committed on the first, and the creditor wishes to discharge it under the statute. There is nothing in these cases, that renders it necessary that the execution should be returned absolutely into the office within its life; but, undoubtedly, in these, and in all other cases in which the creditor has suffered a damage from the want of a return of the execution he would be entitled to his action on the case. In the case before the court the officer committed the debtor on Saturday, the last day of the execution, and on the Monday following, he inclosed it by mail to the justice. There was no unreasonable delay after the commitment, and though the plaint-

iffs aver in their declaration that they have lost the benefit of their execution by the neglect of the defendant, yet the evidence shows, there is no foundation for this complaint. There is no pretense that the plaintiffs have suffered any loss from the want of an earlier return.

By the letter of instructions to the deputy of the defendant, he was authorized to act his sound discretion in the management of the execution, secure it if he could, or any part of it, and was requested to write as to the prospects of its collection. When a deputy sheriff acts under the special instructions of the creditor, giving him a discretion to manage an execution as he shall judge best, the sheriff can not be made responsible for the exercise of such discretion. It seems the deputy declined, under his instructions, to accept of the thirty dollars, and discharge the execution—whether wisely or not, is immaterial—and delayed the commitment until he could be advised on the subject by the creditors. As the deputy had power to take security for the debt, or a part of it, and use his discretion in the management of the execution, it was, necessarily, within his province to judge of the expediency of a commitment of the debtor, and also as to the time such commitment was expedient. The deputy thought best to delay the commitment for the advice of the creditors, until a given day, before he made the commitment. If there was not then sufficient time to return the execution into the proper office within “the sixty days,” the defendant is not responsible for such delay. In short, the discretionary authority given to the deputy, discharges the sheriff of his liability for the official acts of such deputy.

In this case, then, though it should be held, in ordinary cases, to be necessary for the officer, upon a commitment of the body, to return the execution into the proper office within its life, the defendant is not liable, and the judgment of the county court is affirmed.

LIABILITY OF SHERIFF FOR FAILURE TO RETURN AN EXECUTION: *Sloan v. Case*, 25 Am. Dec. 569, and note, in which this subject is fully discussed: *Hall v. Brooks*, 30 Id. 485.

FARR v. SUMNER.

[12 VERMONT, 26.]

CONTRACT OF AN INFANT IS VOIDABLE only, not void, and he can not, while an infant, disaffirm it, except in case of evident necessity.

INFANT CAN NOT, AFTER ARRIVING AT AGE, DISAFFIRM his contract, and recover back property transferred without restoring the consideration received by him.

TROVER. The opinion states the facts. Plaintiff had verdict. *Maeck and Smalley*, for the defendant.

Wm. P. Briggs, for the plaintiff.

By Court, WILLIAMS, C. J. It appears that the plaintiff, while a minor, purchased a span of horses and harness of the defendant and paid therefor, in part, in lumbering and another horse, and in payment of the balance voluntarily delivered to the defendant the horse which is the subject in controversy in this suit. No act has ever been done by the plaintiff to avoid or disaffirm the contract for the purchase of the span of horses and harness, but, on the contrary, he has had the whole benefit of that contract. The plaintiff assumes that the agreement made at Salisbury was in the nature of a contract of sale, and that he was at liberty to treat it as void and maintain this action of trover to recover the horse delivered in pursuance thereof. The contract of an infant, except in certain cases, is not void, but voidable only, and, in general, he can not, while an infant, unless in case of evident necessity, disaffirm a contract made by him; as the same want of discretion, which prevents him from making a binding contract, would prevent him from avoiding one which might be beneficial to him. He is as incapable in the latter, as in the former case, of judging what is for his benefit. Whether, when he arrives of full age, it is necessary that he should do any act to avoid or affirm a contract made while under age, to render it nugatory or binding, is a question on which there are contradictory authorities. Undoubtedly, in some cases, it is necessary that a person should give notice of his disaffirmance, after he arrives at full age, or he will be held to a contract made during his minority. The case of *Goode and Bennion v. Harrison*, 5 Barn. & Ald. 147, was one of this description.

If an infant pay money or deliver property on a contract and enjoy the benefit of it, he can not disaffirm the contract and recover the money paid, without restoring to the other party the consideration which he receives. This was the ground of the decision of *Holmes v. Blogg*, 8 Taunt. 508. The opinion of the court, as delivered in that case, evidently went much further than this, and took the ground, that, where an infant pays money with his own hand he can not recover it back. This opinion

was reviewed in the case of *Corpe v. Overton*, 10 Bing. 252, and it was considered that the expressions made use of by the chief justice in *Holmes v. Blogg* were not warranted by the case. But when, as in the case now before us, an infant makes a contract, receives the benefit and consideration thereof, does no act to disaffirm or avoid it, and delivers property in payment and fulfillment thereof, there is no principle which will warrant a recovery by him, in an action of trover, for the value of the property thus delivered. It does not appear that any evidence was given to show that the plaintiff offered to restore to the defendant the property which he received of him, or that he was in a situation so to do, although such a state of facts is alluded to in the charge of the court.

We think the court erred in their charge in relation to the effect of the infancy of the plaintiff, under the circumstances of the case, and the judgment must be reversed.

INFANTS' CONTRACTS, VALIDITY OF: See *Grace v. Hale*, *ante*, 296, and cases cited in the note thereto.

GLEASON v. PECK.

[12 VERMONT, 66.]

AUDITA QUERELA IS A JUDICIAL WRIT directed to the court having the record, for the purpose of setting aside a judgment or execution, and must be between the parties to the former proceeding sought to be attacked.

AUDITA QUERELA. The facts in this case as disclosed by the evidence and pleadings were, that the defendants, Scofield and Amber, caused the defendant Peck, an attorney, to sue the complainant, in the name of one Cooper, for the conversion of a stove, in which action a judgment was rendered in favor of Cooper. Cooper having died, the judgment was satisfied by a settlement made with his administrator. After such satisfaction, an *alias* execution was issued on such judgment, under which complainant was liable to arrest. Neither Cooper nor his administrator was a party to the writ. Judgment was given for the defendants.

Wm. P. Briggs, for the complainant.

Hyde and Peck, for the defendants.

By Court, COLLAMER, J. *Audita querela* is a judicial writ. Formerly it was issued only in discretion, but afterwards was

sued out in chancery; but must always be to the court having the record. Its purpose is to set aside a judgment or execution, and therefore, like *scire facias*, error, certiorari, and all other judicial writs, it must be between the parties to the former proceeding. Here neither of the defendants in this suit was a party to the judgment or execution; and, of course, no judgment could be rendered to operate on the judgment or execution, and therefore no damages which, by our statute, are incident to such judgment, could be given. It is said the action could not have been against the administrator, as he was in no fault. That is not true. If the administrator undertook to take charge of, and receive pay on the judgment, it was his duty to control the execution, and his neglect of this was a fault, and for this fault, and in conformity with law, he, as the legal representative of the creditor in the execution, was the proper person to have been pursued by the present plaintiff; or application should have been made to the court to supersede and set aside the execution as improperly issued. It is insisted that the county court did wrong in rendering judgment for all the defendants, when the facts alleged in the complaint were fully proved, at least, against one of the defendants. Had the issue been to the jury, the verdict must have been against such defendant, and then, on motion in arrest, judgment would have been arrested. But as the issue was to the court, who do not render a verdict, and as no motion in arrest was made, and as any judgment for the plaintiff would have been erroneous, for want of any proper party defendant, there seems to have been no other course left to the court but to render judgment for all the defendants.

Judgment affirmed.

WRIT OF AUDITA QUERELA, ITS NATURE AND GENERAL EFFECT, is fully discussed in the note to *Staniford v. Barry*, 15 Am. Dec. 696, and in *Little v. Cook*, Id. 698.

ALDRICH v. JEWELL.

[12 VERMONT, 135.]

PROMISE TO PAY ONE FOR WORK PERFORMED FOR ANOTHER, if such other would not, is within the statute of frauds and must be in writing.

ASSUMPSIT for work and labor rendered one Douglas. The case was referred to an auditor, and the material facts found by him are stated in the opinion. Defendant had judgment.

W. P. Briggs, for the plaintiff.

Maeck and Smalley, for the defendant.

By Court, BENNETT, J. It is said, in argument, that this report should have been set aside by the court below, on the ground that the auditor has not reported the facts found by him, but simply the evidence adduced on trial. We think this objection is not warranted by the report itself. The auditor finds, "that the plaintiff observed to the defendant, that he did not know Douglas, but that he would work for him, if the defendant would pay him if Douglas did not; to which the defendant answered, that he would pay the plaintiff if Douglas did not." This is not reporting the evidence, but the precise language in which the undertaking of the defendant was couched, and though this was not necessary, still it is not legally objectionable. There can be no question but what the undertaking of this defendant is within the statute of frauds. It is clearly settled that the statute applies to collateral engagements, that is, to cases where there exists a debt, or legal liability on the part of a third person. If the undertaker comes in aid, only, to procure a credit to be given to a third person, in such case there is a remedy against both, and both are liable according to their distinct engagements, and the undertaking of the one is but collateral to that of the other.

In the case under consideration, the undertaking of the defendant is in express terms in aid of the credit of Douglas, and is, therefore, collateral to his, and within the statute. The judgment of the county court is affirmed.

PROMISE TO ANSWER FOR THE DEBT OF ANOTHER must be in writing: *Leonard v. Fredenburgh*, 5 Am. Dec. 317, and note; *Farley v. Cleveland*, 15 Id. 337, and note; *Skinner v. Conant*, 21 Id. 554.

NASON v. BLAISDELL.

[12 VERMONT, 165.]

JUDGMENT NOT IN REM IS NEVER CONCLUSIVE except upon the very matter in judgment, and between the very same parties or their privies either in blood or estate. As to all others, the judgment may be impeached and contradicted by collateral evidence.

EXPOSITION. Plaintiff deraigned her title by will from one William Nason, who was in possession of the land in controversy in 1801, in which he devised the land to his son John, after his wife's death, upon the condition that he would pay all legacies mentioned in the will, among which was one to the plaintiff for

two hundred dollars. William Nason died in December, 1810, and his wife in 1839. Plaintiff also gave in evidence a deed to herself and others from John Nason, of the land, dated July 21, 1820, and proved that defendant had been in possession since 1834. Defendant then proved that William Nason's title to the land vested on a perpetual lease from one Jotham Bush, made in 1800, which reserved a yearly rent for the same of six dollars and twenty-five cents, and contained a clause that upon one year's rent remaining unpaid for more than a year, it should be lawful for the grantor or his heirs or assigns, upon giving thirty days' notice to the tenant in possession, to re-enter and take possession of the premises. They also gave in evidence a record of a judgment rendered in September, 1827, in an action of ejectment for the land, in favor of Bush and against John Nason, and proved that Bush had taken possession under the judgment. Defendant held under this judgment by virtue of mesne conveyances from Bush. Plaintiff then offered to prove that this judgment was obtained by a fraudulent collusion between Bush and John Nason, and that defendant was holding the land as trustee for John, and that no notice of the non-payment of rent had ever been given as required by the lease of 1800. The court excluded the evidence, and defendant had verdict.

Smalley, Adams, and A. O. Aldis, for the plaintiff.

H. R. and J. J. Beardsley, and S. S. and G. W. Brown, for the defendant.

By Court, REDFIELD, J. The only important question arising in this case, which the court have deemed it necessary to decide, at this time, is, as to the effect of the judgment in favor of *Bush v. Nason*, September, 1827. There is no evidence in the case, except that furnished by the judgment itself, that John Nason was ever in possession of the premises, or that he is not a mere stranger to the title of William Nason. For it does not appear that he ever claimed title under the will, or performed the conditions upon which the land was devised to him. It is to be borne in mind, too, that the facts offered to be proved, at the trial, by the plaintiff, so far as they are material to the decision of this case, must here be considered as proved. It results, then, that the defendant attempts to screen his intrusion upon the possession of the plaintiff, under the title of Bush, in order to do which he must first show the lease to William Nason avoided by non-payment of rent, or some other breach of condition.

This is not attempted to be done, except by force of the judgment against John Nason.

It is obvious, that this judgment is in no sense conclusive upon the right of the plaintiff. A judgment which is not *in rem*, is never conclusive except upon the very matter in judgment, and between the very same parties or their privies, either in blood or estate. As to all others, the judgment may be impeached and contradicted by collateral evidence. For as those who are not parties or privy to the judgment could have no process to operate directly upon the judgment, if they could not attack the judgment collaterally, they would be remediless. This point was decided on the last circuit in Orleans county, in the case of *Atkinson v. Allen* [post, 361]. The rationale of the rule of the conclusiveness of judgments, is merely technical and arbitrary, and one of convenience only. There is not any more sacredness, absolutely, in the proceedings of a court of justice than of many other tribunals, whose acts are always subject to be scrutinized and revised even. But that there may be an end of controversy, this rule has been adopted. The same matter, once litigated in a court of justice, and definitively adjudicated, is forever put at rest, for the alleged reason, that, unless this was so, litigation would be endless. If, when a party had once litigated a point, or, which is the same thing, had had an opportunity of litigating it, he might still renew the controversy at will, the present evils of litigation would be indefinitely multiplied. And hence, the universally acknowledged wisdom of the maxim: *Sit finis litium, interest reipublicæ*.

But, it needs no argument to show that this rule can not, in justice, be applied to one who is neither a party to the judgment, nor had any opportunity of becoming a party. A judgment, rendered under such circumstances, is of no more force, as against strangers, than if the record had been forged. It would be surely vain labor, to show, in detail, the many manifest absurdities and wrongs, which would naturally flow from the opposite doctrine. If two persons, by getting up a formal judgment in a court of record, could bind all the world conclusively, as to all the facts upon which the judgment was predicated, it would be a mode of proof often resorted to, I fear. As the court below erred in the effect which they gave to the judgment in question, judgment is reversed and a new trial granted.

STRANGERS TO A JUDGMENT CAN NOT AVOID ITS EFFECTS by showing that it was erroneous: *Baudin v. Roliff*, 14 Am. Dec. 181. Decree of an orphans

court confirming a sale by an administrator can not be collaterally attacked: *Van Dyke v. Johns*, 12 Id. 76.

JUDGMENT MAY BE COLLATERALLY ATTACKED for want of jurisdiction to render it: *Starbuck v. Murray*, 21 Am. Dec 172, and note; *Dufour v. Camfranc*, 13 Id. 360, and note.

DAVIS v. FULLER.

[12 VERMONT, 178.]

ALTERATION OF A DEED, WHEN DOUBTFUL, will not warrant its exclusion from evidence.

DESCRIPTION OF A LOCUS IN QUO MAY BE PROVED BY PAROL, as a matter of reputation.

PAROL EVIDENCE OF THE STATEMENTS OF PERSONS competent to be witnesses, when against their interest, can not be given without proof of their death, especially when such statements are mere matters of opinion.

RIPARIAN PROPRIETOR CAN NOT BE DEPRIVED OF HIS RIGHT to the natural flow of a stream by mere use or appropriation by another, except by grant or by use or occupation for such a length of time that a grant will be presumed.

ACTION on the case, for obstructing a stream which flowed through plaintiff's land, described as lot No. 133, in Enosburgh, by reason of the erection of a dam, which caused the water to flow back and injure plaintiff in the use of his mill situated on such lot. Plaintiff introduced a witness who testified, against defendants' objection, that the lot on which the mill was situated was known as lot No. 133. Defendants offered to prove, by evidence of the declarations of a prior owner of plaintiff's mill, that before the erection of defendants' dam, there had been a similar obstruction to the use of the mill, caused by the accumulation of ice in the river. This evidence was objected to and excluded. The further facts appear in the opinion. Plaintiff had verdict.

Smith and Aldis, and Smalley and Adams, for the defendants.

S. S. Brown and H. R. Beardsley, for the plaintiff.

By Court, COLLAMER, J. There is much diversity, in the authorities, in relation to apparent alterations in written instruments. By some it is considered such alterations are to be presumed to have been made by the holder after delivery, and that unless he rebuts this presumption, and shows it was made before delivery, or by mutual consent, it destroys the paper. This seems to presume the holder is guilty of forgery and has destroyed his own security. Other law writers consider that such alterations are to be presumed made before delivery or by consent, until the con-

trary is shown. But, in this case, we think the question does not arise, as we find on inspection, that there was no such obvious alteration that the court could, consistently with any course of decisions, have excluded the deed from the jury. The very fact of there being any alteration was quite too doubtful to be assumed by the court. The plaintiff alleged that the injury done him was on lot No. 133. This number was not a matter in issue, that is, the plaintiff did not claim to own No. 133; neither does it seem to have been important as a matter of identity, as there was no doubt where the plaintiff's mill, in fact, was. It was a part, and entirely a useless part, of the description of the *locus in quo*, for the plaintiff's land was otherwise described in his deed with sufficient precision. But, as it was matter of description, it must be proved. Reputation was, however, sufficient. That the lot had been so called and treated was enough. Therefore, Woodward's testimony, that he bought, held, and sold it by that name, was clearly admissible.

Among the few exceptions to the rule of law, that the statements of persons, out of court, who might be witnesses in, are not permitted to be proved, is this—the statements of tenants or occupants of land, of the extent or nature of their tenancy. But it is not true that any statement which a man may have made, which was against his interest, is admissible in evidence, because he can not be presumed to have done it falsely. The entries in physicians' and stewards' books, made against their interest, have never been permitted to be proved while they, the physicians or stewards, were still living. Here the defendants offered to show that persons who owned mills on this dam, had said they had been troubled with back-water in the winter, and that it was owing to anchor ice on the falls below. No proof was offered that these persons were deceased. This did not fall within either of the above exceptions and was inadmissible. Besides, it was a mere matter of opinion, on the point on trial, and they could hardly have been permitted to testify to it in court, much less could their opinions on this point be put in evidence, without the sanctions of legal obligation. The case does not contain any sufficient statement to present to this court the question, debated by the counsel, as to the attempt to impeach Hazelton. The case shows it was offered to be proved he had said his sawmill had been obstructed by ice below, but the case does not show that when his mill was obstructed the plaintiff's must be also.

This brings us to the main question in the case, that is, what

are the respective rights of these parties. The jury, under the charge of the court, have found the following facts. The plaintiff holds a certain lot of land, across which flows a river on which he has a grist-mill. The defendants own land on the stream below, where they have erected a dam to carry a saw-mill, but have erected it no higher than is necessary for that purpose. This dam occasions accumulations of ice, which, at times, flows the water back on to the plaintiff's land and obstructs his mill to his injury. There has been no grant between the parties and no user for any such lapse of time as that any grant could be thereby presumed. What are the rights of these riparian proprietors?

It has been supposed, and at times said, in our courts, that, by the first appropriation of the stream to the carrying of a mill, some exclusive right was obtained, and that the rights of proprietors of land to the natural flow of the water across their land must be qualified, or accommodated, or, in some degree, give way to the convenient and prudent use of that water by mill-owners above and below. The use of water in ordinary streams, running over lands which are upon the private property of individuals, has been attempted to be placed on the same principle as using the water of the sea or of navigable rivers or the use of the air; a mere right derived from the appropriation from the common stock of the element. This, however, is a wrong view of the subject. The owner of land has rights to the use of a private stream running over his land, peculiar to himself as owner of the land, not derived from occupancy or appropriation, and not common to the whole community. It is the right to the natural flow of the stream. Of this right he can not be deprived by the mere use or appropriation by another, but only by grant or by the use or occupancy of another for such a length of time as that therefrom a grant may be presumed. This subject has recently undergone much judicial examination. In the laborious research of the learned Judge Cowen, lately given to the profession in his notes to Phillips' Evidence, vol. 2, 378, on this subject, he says: "It is not to be disguised that the doctrine of exclusive right, founded on mere priority of appropriation, received, at one time, strong countenance from dicta of learned judges, if not by direct adjudication;" "and in the anxiety to maintain the concurrent erection and use of mills, the claim to the natural flow seemed to rest on very uncertain ground:" and he cites 15 Johns. 215; 17 Id.

1. *Platt v. Johnson*; 8 O., 8 Am. Dec. 233.

306;¹ 3 Cai. 307;² 2 Aik. 184;³ the same authorities on which the defendants rely.

In England, in the recent case *Wright v. Hammond*,⁴ before the vice-chancellor, in 1831; and in the case *Mason v. Hill*, before the king's bench, in 1832, the subject underwent judicial investigation: 3 Barn. & Ald. 304;⁵ 23 Com. L. 77. Says Lord Tenterden, adopting the language of the master of the rolls: "Without the consent of the proprietors who may be affected by his operations, no proprietor can either diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above. Every proprietor who claims either to throw the water back above or to diminish the quantity which is to descend below, must prove an actual grant or license from the proprietors affected, or an uninterrupted enjoyment of twenty years." "An action will lie at any time, within twenty years, when injury happens to arise in consequence of a new purpose of the party to avail himself of his common right." In New York, in the case 10 Wend. 260,⁶ the same doctrine is settled. In Massachusetts, the same doctrine is now fully settled: 9 Pick. 59.⁷ In Connecticut this is also fully sustained in the case *King et al. v. Tiffany*, 9 Conn. 162. And in these authorities, the courts repudiate the notion that the amount of the damage alters the principle. In this state, the case of *Johns v. Stevens and Brewster*, 3 Vt. 308, recognizes the same law. The result of all these authorities, then, is, that every owner of land over which a stream flows, has the right to the natural flow of that stream; that he can never be deprived of this right but by grant, actual or presumptive. Whenever this right is encroached upon by obstructions or perversions, above or below, and actual injury ensues, to any material amount, an action accrues, however valuable or convenient the use of such obstructions may be to him who erected them. Judge Story says, in the case *Tyler v. Wilkinson*,⁸ "Mere priority of appropriation of running water confers no exclusive use." And again, "The true test of the principle and extent of the use is, whether it is to the injury of the other proprietors or not." The notion now insisted on for the defendants, that a man who has a mill privilege may use it, if he does no wanton or unnecessary injury to another, is entirely without

1. *Merritt v. Brinkerhoff*; 8 U. S. 404.

2. *Palmer v. Mulligan*; 8 U. S. 270.

3. *Martin v. Bigelow*; 8 U. S. 596.

4. *Wright v. Howard*, 1 Sim. & Stu. 190.

5. 3 Barn. & Adol. 304.

6. *Crook v. Bragg*; 8 U. S. 555.

7. *Thompson v. Crocker*.

8. 4 Mason, 397.

foundation. No man can be said to have a mill privilege which can not be used without injury to others. The plaintiff acquired no right by the first erection of his mill, but he had a right to the natural flow of the stream. The defendants, by their dam, interrupted that right. The plaintiff was thereby injured, and for this could sustain his action.

Judgment affirmed.

AS TO THE EFFECT OF ALTERATIONS IN INSTRUMENTS generally, see the note to *Woodworth v. Bank of America*, 10 Am. Dec. 267, and cases cited; *Wooley v. Constant*, 4 Id. 246; *Stephens v. Graham*, 10 Id. 485; *Den v. Wright*, 11 Id. 546; *Campbell v. McArthur*, Id. 738; *Bailey v. Taylor*, 29 Id. 321, and prior cases in this series cited in note. In *Hatch v. Hatch*, 6 Id. 67, it was said that the rules as to the alteration of written executory contracts are not applied with the same strictness to conveyances of real estate which have vested in possession.

DECLARATIONS AND ADMISSIONS OF PERSONS IN POSSESSION OF LAND, when allowable in evidence: See note to *Deming v. Carrington*, 30 Am. Dec. 595, and prior cases in this series cited therein.

WATER RIGHTS OBTAINED BY APPROPRIATION AND PRESCRIPTION: See *Sherwood v. Burr*, 4 Am. Dec. 211, and note: *Platt v. Johnson*, 8 Id. 233; *Strickler v. Todd*, 13 Id. 649; *Wetmore v. White*, 2 Id. 323; *Cook v. Hull*, 15 Id. 208; *Blanchard v. Baker*, 23 Id. 504; *Hoy v. Sterrett*, 27 Id. 313, and note.

NASH v. SKINNER.

[12 VERMONT, 219.]

INDORSEMENT UPON THE BACK OF A NOTE, prior to its delivery, by one not a party thereto, renders him liable as a joint promisor.

AGREEMENT THAT ONE WHO PLACES HIS NAME ON THE BACK OF A NOTE for the accommodation of the maker, shall be liable only as a second indorser, will not limit his liability to the payee as a principal.

NON-JOINDER OF A JOINT PROMISOR, in an action of assumpsit, is only matter of abatement, and can not be taken advantage of under the general issue.

ASSUMPSIT on a promissory note, made by one Jewett, at the town of Granville, state of New York, payable at Troy in the same state, and indorsed by Skinner, Henry Bulkley, S. Bulkley, and H. L. Sabin, the last three doing business as partners under the firm name of H. and S. Bulkley & Co. The further facts appear in the opinion. Plaintiff had verdict.

E. N. Briggs and E. F. Hodges, for the defendants.

Starr and Bushnell, for the plaintiff.

By Court, BENNETT, J. The important inquiry in this case, is, as to the right of the plaintiff to recover upon the facts de-

tailed in the bill of exceptions. It seems the note was signed by Jewett, and indorsed, in blank, by Skinner and Buckley & Co., in New York, for the purpose of enabling Jewett to pass it to the plaintiff in payment for wool, which he was about to purchase of him, and that Skinner, as well as Buckley & Co., well understood, at the time the note was indorsed, the use to which it was to be appropriated, and it was accordingly passed to the plaintiff in payment for wool purchased of him by Jewett.

It has been decided, in this state, and may be regarded as settled law, that when a person, not a party to a note, signs his name upon the back, without any words to express the nature of his undertaking, he is considered as a joint promisor with the other signers: *Barrows v. Lane and Benham*, 5 Vt. 161 [26 Am. Dec. 298]; *Knapp v. Parker*, 6 Id. 642; *Flint v. Day*, 9 Id. 347. This is also the settled law of Massachusetts, and in the case of *Hunt v. Adams*, 6 Mass. 519, and in *Moies v. Bird*, 11 Id. 436 [6 Am. Dec. 179], it was held that, upon the indorsement alone, the indorser was, *prima facie*, and without any proof to explain it, to be treated as a joint promisor. It is said, however, in argument, that this contract is to be governed by the laws of New York; and that by the decisions of the courts of that state, the plaintiff is not entitled to retain his verdict. We will examine, for a moment, the New York cases. In the case of *Herrick v. Carman*, 12 Johns. 159, in error, it did not appear that the plaintiff in error indorsed the note for the purpose of giving the maker of the note a credit with the payees of it, or that he was, at the time he indorsed the note, in any way advised of the use to which the maker intended to apply it. The court say, in the absence of any proof to the contrary, we must intend that Herrick meant only to become the second indorser, with all the rights incident to that situation, and that the fact of his indorsing first, in point of time, could have no influence, as he must have known, and we are to presume he acted on that knowledge, that though first to indorse, yet his indorsement would be nugatory, unless preceded by that of the payee of the note. The case of *Tillman v. Wheeler*, 17 Johns. 326, is decided upon the same principle. The legal presumption, it is said, is, in the absence of any explanatory proof, that the persons who put their names upon the back of a note, do it for the accommodation of the payees, and are to stand as second indorsers. This, it is true, is a different inference from what the courts of Massachusetts would have made, and, perhaps, of this state. In the cases decided by our courts, it distinctly appears

that the persons indorsing the notes, were fully apprised of the uses to which the notes were to be applied.

In the case of *Nelson v. Dubois*, 13 Johns. 175, it appeared the defendant put his name on the back of the note to give the maker credit with the plaintiff, and that the plaintiff parted with his property, relying upon the indorsement. In that case the court recognize the case of *Hunt v. Adams*, 5 Mass. 358 [4 Am. Dec. 68], and *White v. Howland*, 9 Id. 314 [6 Am. Dec. 71], as sound law, and it was held that Dubois was liable as upon an original undertaking, as surety, and as much so as if he had signed the body of the note. The case of *White v. Howland* is very similar to the one before the court. In that case one Taber gave a note to the plaintiff, payable on demand. It appeared the amount of the note was loaned to Taber, upon his agreeing to give his note with two indorsers, and that the note was given with that intent, payable to White, and indorsed by one Coggeshall and the defendant. The court held that the plaintiff was entitled to recover, and that the effect of the defendant's signature was the same as if he had subscribed the note upon the face of it, as surety, and that he was answerable as an original promisor with Taber. So in the case of *Campbell v. Butler*, 14 Johns. 349, where A. had agreed to become surety for B., upon the purchase of goods from C., and B. made a note to C. for the amount, payable to his order, on which A. indorsed his name, in blank, it was held, upon the authority of *Nelson v. Dubois*, that C. might fill up the blank with an express agreement to pay the note, and that A. was liable as an original promisor. The defendant, when he indorsed this note, understood it was to be passed to Nash, and it was indorsed with this intent, and to give the maker, Jewett, a credit with the plaintiff, and not to enable him to put the note in circulation. The presumption, then, that this note was indorsed for the accommodation of Nash, and that Skinner was to stand as second indorser, is effectually rebutted, and the case falls directly within the principle of the case of *Nelson v. Dubois* and of *Campbell v. Butler*. In this case the signatures of all the promisors were made at the same time, and before the note was delivered to Nash, and the consideration to bind the surety is apparent from the case, it being the credit given to the principal, by the promisee of the note for the value received of him. The defendant could not be made liable as indorser, simply, so long as the paper remained in the hands of the promisee, and it is evident that he did not indorse it with the expectation of aiding Nash in putting

the note in circulation. The well-settled principles of law, as well as common justice, require that he should be holden as an original promisor.

The declaration of the defendant Skinner, to Buckley and Jewett, at the time the note was made, "that if they signed such a note, they should stand only as second indorsers, and that Nash would not take it, as it would do him no good," can have no effect to limit the liability of the defendant. It was evidently no more than the expression of a legal opinion of the effect of the blank indorsement of such a note. It was not intended to limit the obligation. Besides, this conversation was not carried home to Nash. Jewett can no more be regarded as the agent of Nash, than Bulkley, and when this note was made and indorsed for the express purpose of being passed to Nash, in payment for wool, which Jewett was to purchase of him, the rights of the plaintiff can not be prejudiced by any private conversation or understanding between the maker and indorsers, not carried home to the knowledge of the plaintiff. Such testimony was wholly immaterial, as to the merits of this action, and, consequently, it is no good ground why this court should grant a new trial, though the court below refused to admit testimony to show that the witness, Jewett, had given a different relation in this particular, from that which he gave upon the stand.

It is said, in the argument, that there is a variance between the declaration and the proof, but this objection is without foundation. In the case of *Pease v. Morgan*, 7 Johns. 468, cited by the defendant's counsel, it was indeed held that where the plaintiff declared that the defendants made the note, "their own proper hands and names being thereto subscribed," and the proof being that the note was signed in the name of the firm, by one of the defendants, there was a variance. The declaration, in that case, did not allege that the defendants were partners, or acted under the name of the firm by which the note was signed. In this case the three persons composing the firm of H. and S. Bulkley & Co., are set up, in the writ, as co-partners, under the aforesaid firm, and it is averred in the declaration, that the defendants made and signed their certain note, etc., not adding that it was subscribed by the proper hands and names of the defendants. It is always sufficient to declare upon a written instrument, according to its legal effect, and if the evidence supports the allegations, it is all that is required. It can not be objected, as a ground of variance, that

Jewett should also have been joined in the suit as a joint contractor. In an action of assumpst the non-joinder of a joint promisor, is only matter of abatement, and can not avail the party under the general issue.

It is also said, that inasmuch as the declaration issued in this case against Skinner and H. and S. Bulkley & Co., the plaintiff, to support his declaration, is bound to prove a joint contract, made by them all, though a *non est inventus* has been returned as to the Bulkleys and Sabin. It is not, however, under our statute of 1835, material to decide whether the firm of H. and S. Bulkley & Co. were bound by the signature of Henry Bulkley, or not.

Our statute provides, that, when any of the defendants are not a party to the contract, the plaintiff may recover against the other defendants, who are shown to have made the contract. The judgment of the county court is affirmed.

ONE WHO WRITES HIS NAME ON THE BACK OF A NOTE at the time it was made, incurs the liability of a joint promisor: *Baker v. Briggs*, 19 Am. Dec. 311; *White v. Howland*, 6 Id. 71; *Motes v. Bird*, Id. 179. The admissibility of evidence to vary the effect of an indorsement is discussed in the note to *Hill v. Ely*, 9 Id. 381.

ROSS v. FULLER.

[12 VERMONT, 265.]

APPOINTMENT OF A SPECIAL OFFICER TO SERVE PROCESS is a judicial act, and can be exercised only by the authority signing the process.

DEPUTATION OF AUTHORITY TO SERVE A WRIT signed by a justice of the peace in blank, and afterwards filled up by a stranger, confers no authority upon the person therein apparently authorized.

RADICAL DEFECT IN THE APPOINTMENT OF THE PERSON who serves a writ, is not cured by judgment by default.

IN TRESPASS ALL ARE LIABLE WHO PARTICIPATE in the wrongful act, either by aiding in, or advising, or assenting to it.

INDORSER OF A NON-NEGOTIABLE NOTE IS NOT LIABLE AS A TRESPASSER for the seizure of property under a void attachment issued in a proceeding brought thereon in his name as nominal plaintiff.

TROVER for a mare, seized by the defendant Carpenter, by virtue of a writ of attachment issued by a justice of the peace in an action against the plaintiff, brought in the name of the defendant Fuller, on a non-negotiable note, transferred by him to one Smith. It appeared that the writ of attachment had been signed by the justice in blank, and the deputation of au-

thority to Carpenter afterwards filled in by a stranger, without the knowledge of the justice. The further facts appear in the opinion. The plaintiff had verdict against both defendants.

C. Linsley and W. P. Briggs, for the defendants.

Hyde and Peck and S. S. Phelps, for the plaintiff.

By Court, ROYCE, J. The appointment of a special officer to make service of process is a judicial act, which can be exercised only by the authority signing the process. This is fully settled by the case of *Beebe v. Steel*, 2 Vt. 314, and others which have followed it. It must result that the deputation upon the original writ, in this instance, having been signed by the magistrate in blank, and afterwards, without his direction or knowledge, filled up by a third person, conferred no legal authority upon the defendant, Carpenter. He was never appointed to serve the writ, and his proceedings under it were therefore unauthorized and void. Besides, the fact that the writ was merely signed in blank, when the supposed deputation was indorsed upon it, would render the deputation ineffectual and void, even had it been filled with the name of Carpenter by the justice himself: *Kelly v. Paris*, 10 Vt. 261 [33 Am. Dec. 199]. And this was not a mere ground of defense to the suit by way of abatement, but a radical defect, which the judgment by default did not cure. The plaintiff was, of course, entitled to recover, in this action, against the defendant, Carpenter. It remains to consider the case in reference to the defendant Fuller. It appears that he held the plaintiff's note, which was not negotiable; that at the plaintiff's request, he passed the note to one Smith, who had the plaintiff's express consent that he might dispose of it to whomsoever he pleased; that Smith sold it to one Allen, who instituted a suit upon it, and caused the horse in question to be attached and taken away by Carpenter. The question is, whether Fuller, the original payee of the note, and whose name was necessarily used in the suit upon it, is liable for the trespass complained of.

The principle that, in trespass, all are liable who participate in the act, whether by aiding in it, or advising or assenting to it, will sometimes subject a person, as a trespasser, who has merely delegated an authority to be executed for his benefit. This is the ground upon which the cases cited from Wilson are sustained, and upon which the real party to a suit is usually made responsible for the acts of his attorney, and for those of ministerial officers employed in his service. But the case at bar is not within the spirit of this rule. The defendant, Fuller, was

a nominal, but not a real party to these void proceedings. His previous sale of the note was a legal act, operating to transfer the interest in it for all collateral purposes; for every purpose, indeed, except that of prosecuting a suit directly upon the note. The legal custody of the instrument belonged to the purchaser, as would the avails, when collected or otherwise received. And his authority to use the name of Fuller, in suing upon the note, was a power to be executed for his own benefit, and over which Fuller had no control. Why, then, should he be answerable for this trespass, committed in his name, but without his co-operation or power of prevention? To hold him liable, it must be assumed that the record, in the action upon the note, furnishes evidence which is legally conclusive that he did personally concur in the trespass, or had an interest to be promoted by it. But, since all this may be effectually disproved for other purposes, we think the evidence equally available for his protection in this instance. It is true, that, according to the decision in *St. Albans v. Bush*,¹ the plaintiff of record in an unsuccessful suit, though it were brought without his privity or consent, is conclusively fixed with the costs recovered therein by the other party. But that case evidently proceeds upon a ground too narrow to sustain the present. It does not affirm the conclusiveness of the record, for any purpose beyond that of enforcing the judgment itself. The case of *Tichout v. Cilley*² has a much nearer resemblance to the present, and some of the reasons which appear in the opinion of the court, would seem to go the length of supporting this action. In some important particulars, however, the two cases differ. In selling the note of Tichout to Taylor and Prentiss, there was an express stipulation contemplating a suit on the note, and Cilley regulated his responsibility in reference to it. He also turned out property upon the original writ, and, according to the report of the case, Tichout does not appear to have had notice that his note had ever been transferred. As several of these considerations appear to have entered into the grounds of that decision, we can not regard it as an authority governing the present case.

Judgment of the county court reversed.

MUNSON v. HASTINGS.

[12 VERMONT, 345.]

PRIOR STATEMENTS OF A WITNESS OUT OF COURT, ARE INADMISSIBLE to corroborate his testimony.

PROMISE OF MARRIAGE MAY BE IMPLIED FROM CIRCUMSTANCES, but mere attentions paid by a man to a woman, although exclusive and long continued, will not warrant such presumption.

ASSUMPSIT for breach of promise of marriage. The evidence tended to show that the defendant for the period of seven years had paid the plaintiff marked and constant attention, by visiting her at her father's house, taking her out driving, etc., and was received and recognized by her as her accepted suitor, and that he had frequently admitted that he had agreed to marry her, and had expressed his approval at the purchase of certain furniture by the plaintiff's father, in anticipation of such marriage. These facts the defendant denied. The deposition of one Lura Culver was introduced in evidence, showing that plaintiff had been discovered in improper associations with other men. Upon an attempt to impeach the testimony of Culver, the defendant offered to prove, in corroboration of the same, that she had at other times made similar statements, but the court excluded the testimony. The court, against defendant's objection, instructed the jury that they might infer a promise to marry on the part of the defendant, from constant, long-continued, and exclusive attention to plaintiff.

P. Smith and E. L. Ormsbee, for the defendant.

C. Linsley, and Clark and Harrington, for the plaintiff.

By Court, ROYCE, J. There are cases in which evidence of the previous declarations of a witness is not only proper, but where the want of such proof would require a satisfactory explanation. Those are cases, however, where the silence of the witness would operate strongly to discredit the fact afterwards sworn to; as in the case of bastardy, rape, robbery, and the like. But in general, though the sayings of a witness, out of court, may be received to impeach him, they are by no means admissible to corroborate his testimony. The reason is, that they constitute but hearsay evidence, mere declarations without the sanction of an oath, and because, in the case of a witness already laboring under suspicion, they are rarely calculated to increase, in any degree, the confidence due to his testimony. The decision of the county court, rejecting the evidence proposed, was clearly correct.

The remaining inquiry relates to the kind of evidence necessary to prove the alleged promise. And, in order to determine whether the defendant's exception upon this part of the case is well taken, we must lay out of consideration certain portions of the evidence which had a direct tendency to establish the promise; such as the defendant's admissions, his approval of furniture, etc. The contested portion of the judge's charge relates exclusively to a different species of testimony. That mutual promises of marriage may be implied from proper and sufficient circumstances can admit of no doubt. But the question presented by the charge is, whether they can be implied from mere attentions, though exclusive, long continued, and manifesting an apparently serious and settled attachment between the parties. It is certain that such attentions do not constitute the agreement of marriage, though they usually precede it. They may be of longer or shorter continuance, without terminating in such a contract. And hence the difficulty of determining when, if ever, they should be admitted to furnish sufficient legal evidence that the contract has in fact been made. It might, at first view, be inferred from the verdict, that the jury must have found the addresses of the defendant to have been marked with every characteristic mentioned by the judge; as that they were not only constant, long continued, and exclusive, but such as an honorable gentleman would not bestow, nor a prudent lady receive, unless a marriage contract had been formed between them, and that they would ordinarily be considered, by the circle in which the parties moved, as conclusive evidence that such contract existed. But, since the case alludes to no fact or circumstance upon which to predicate a conclusion that the attentions were in any respect such as honor or prudence would usually forbid, they need only to be considered in reference to the period of their continuance, and their influence upon the belief of friends and acquaintances. That they were constant and exclusive was no more than what is generally observed where the parties are respectable.

The length of time was such, in this instance, as to evince a degree of indiscretion in both parties, and especially the plaintiff, if a marriage was not agreed upon. But the law has not determined that any particular period of courtship shall be evidence of a marriage contract. If protracted to a needless and unreasonable extent, it is even calculated to excite doubts in others whether it is finally to result in marriage. We are of opinion that neither the time, in this case, nor the other considerations

which I have mentioned, were sufficient to justify the finding of an actual contract. Nothing need be added as to the probable opinions and belief of third persons. It is clear that to allow such opinions to influence the finding of this contract, as between the direct parties to it, would be giving place to a principle which is wholly inadmissible in other cases.

Judgment of the county court reversed.

EXPRESS PROMISE TO MARRY IS UNNECESSARY to be proved in an action for breach of such promise, but the same may be inferred from the attending circumstances: *Johnson v. Caulkins*, 1 Am. Dec. 102; *Wightman v. Coates*, 8 Id. 77; *Willard v. Stone*, 17 Id. 496; *Green v. Spencer*, 26 Id. 672.

THE PRINCIPAL CASE IS CITED and distinguished from the one before the court, in *Russell v. Cowles*, 15 Gray, 585, to the effect that a promise of marriage may be proved by circumstances.

CORROBORATION OF WITNESS BY HIS DECLARATIONS OUT OF COURT: See *Johnson v. Patterson*, 11 Am. Dec. 756 and note; *State v. De Wolf*, 20 Id. 90.

PARK v. BATES.

[13 VERMONT, 381.]

IMPOSSIBILITY OF A GRANTEE'S OBTAINING POSSESSION of the land conveyed, will support an action for breach of the covenant of warranty, without proving a technical eviction.

MEASURE OF DAMAGES IN AN ACTION FOR BREACH OF THE COVENANT OF WARRANTY is the value of the land at the time of eviction, without regard to the consideration expressed in the deed.

ACTION for breach of covenant of warranty. Plaintiff had never been in the actual possession of the land conveyed to him, but had brought an action of ejectment therefor, against the occupant, but had been defeated by a superior title. The judge charged the jury that the measure of damages was the value of the land at the time of eviction, with interest thereon. The plaintiff had verdict.

D. Robinson, jun., and U. M. Robinson, for the defendant.

J. S. Robinson and Lyman, for the plaintiff.

By Court, WILLIAMS, C. J. The defendant, upon the trial below, insisted that the rule of damages, upon a breach of the covenant of warranty, was the consideration in the deed and the interest, and no more. Whether the court gave the true rule of damages, in their charge to the jury, is the question now before us. The argument has taken a somewhat wider range and it has been contended that there has been no eviction so as to give a

remedy on the covenant of warranty, and several cases have been referred to, where it has been said, there can be no recovery on the covenant for quiet enjoyment unless there has been an eviction. Those remarks were true, as applicable to those cases. When the grantee goes into possession under his deed, he can maintain no action on this covenant, unless there is an eviction. Speaking technically, there has been no eviction here, because an eviction means an entry and expulsion. But there are many cases where an action may be maintained on this covenant, without such an eviction, when the grantee has been prevented from entering and enjoying the premises. In arguing the case of *Whitbeck v. Cook*, 15 Johns. 483 [8 Am. Dec. 272], the attorney-general, Mr. Talcot, took the ground, that, because the grantee could not get into possession of his land, there was no breach of the warranty. In the case of *Holder v. Taylor*, Roll. Abr. 520, which was covenant on a lease, by the word demise, it was objected that no action would lie, because there was no expulsion. The court held that the action could be maintained, and that it was not reasonable to require the lessee to enter and recommit a trespass; but they add that if it was an express covenant, perhaps it might be otherwise. The case of *Cloake v. Hooper*, found in 6 Vin. 427, was an express covenant for quiet enjoyment. The plaintiff set forth in his declaration, that the lands belonged to the king, who had conveyed them to J. S. The defendant demurred, because the plaintiff did not allege an entry by himself, and so could not be disturbed. The court held the declaration good, for having set forth a title in the patentee of the king, the plaintiff should not be enforced to enter and subject himself to an action, by a tortious act, and rendered judgment for the plaintiff. This principle was recognized in the case of *Hacket v. Glover*, 10 Mod. 142. In the case of *Ludwell v. Newman*, 6 T. R. 458, the breach alleged, was, that there had been a previous demise, and the plaintiff had brought an action of ejectment and had failed to recover, and was never in possession.

The case of *Hawkes v. Orton*, 5 Ad. & El. 367, which was covenant for quiet enjoyment, the plaintiff alleged an entry by himself, and an expulsion by the defendant; the entry and expulsion were traversed, and the evidence was, that the plaintiff went with intent to take possession and was refused. Lord Abinger permitted the case to go to the jury, on this evidence, as evidence to support the issue. The plaintiff contended that it was an eviction in point of law; the court held the evidence

did not prove the breach, as stated in the declaration, to wit, an entry and eviction, but clearly intimated that if the facts had been properly stated, there might have been a recovery. In 5 Went. Pl. 53, there is a form of a declaration in an action of covenant where the breach assigned, is, that the plaintiff was hindered and prevented from entering, and was kept out of possession. I apprehend, therefore, that on the covenant for quiet enjoyment, and *a fortiori*, on this covenant of warranty, it is not necessary to state, or prove, a technical eviction, but the action may be maintained if the plaintiff is hindered and prevented by any one, having a better right, from entering and enjoying the premises granted. The evidence was sufficient, in this case, to warrant a recovery by the plaintiff on the covenant of warranty.

On the subject of damages, the rule has been different in different states, and wherever the subject has been discussed, many fancied inconveniences and hardships have been supposed, as a reason for adopting one rule, rather than the other, and, particularly, it has been supposed that the rule which has prevailed in this and some of the neighboring states must, in the fluctuations and changes in value to which lands are exposed, be ruinous in its consequences. In answer to this, I can only say that the rule of damages, in actions on covenants of warranty, was established at an early day in this state, as we learn from the case *Strong v. Shumway*, D. Chip. 110,¹ and none of these inconveniences or ruinous consequences have been experienced. The rule is, to give the value of the land, at the time of the eviction, without regard to the consideration of the deed, and it may be more, or less, than the consideration; and, to me, it appears to be more in consonance with the principles of law, as applicable to other subjects, and more just and equitable in its application than any other rule.

The general rule, in all actions of covenant, is, to make the party good, or place him in as good a situation as he would have been in had the covenant been performed. The covenant of warranty is both for the title and possession, and is prospective. It is similar to the covenant contained in the charter of feoffment, or more like the covenant contained in a fine. In *Wotton v. Hele*, 2 Saund. 175, there is a declaration on a covenant of warranty contained in a fine, where the warranty is nearly in the same words as used in our deeds of conveyance. It imposes an obligation on the party covenanting to estab-

1. *Drury v. Shumway*; S. C., 1 Am. Dec. 704.

lish and prove a lawful right and title to the premises when called on legally so to do, and, in this respect, it is similar to the ancient warranties. Lord Ellenborough, in the case of *Howell v. Richards*, 11 East, 633, considered the covenant for quiet enjoyment as "an assurance against the consequences of a defective title, and of any disturbance thereon," and that it is in the nature of a stipulation to indemnify. The grantor may know his defective title, and at the same time calculate there will be no disturbance, and the title become perfect, and be willing to take upon himself the risk of indemnifying his grantee. If the covenant was to convey land at any future time, there can be no question that the damages for breach would be the value of the land at the time the conveyance was to be made. This was said to be the rule of damages for a breach of a contract to convey real as well as personal estate: *Hopkins v. Lee*, 6 Wheat. 109. On the covenant for further assurance, Mansfield, C. J., in the case of *King v. Jones*, 5 Taunt. 418, intimated that a recovery for the whole value of the estate might be had if the other party would not convey.

The rule of damages on the covenant for quiet enjoyment was evidently considered as unsettled in England when the case of *Lewis v. Campbell*, 8 Taunt. 715, was tried. The jury, at first, gave the whole value of the land, including the value of the improvements, being three hundred pounds for the value, and four hundred and fifty pounds for improvements. It was held that the value of the improvements could not be recovered under that declaration, inasmuch as the form in which the special damages were assigned did not embrace those improvements. The chief justice expressed a doubt whether they could be recovered in any form; but I should infer the other judges were inclined to the opinion that they might have been recovered if properly stated. I can find no case in the English authorities in which the consideration expressed in the deed has been considered as the rule of damages. It can be considered only as one evidence of value, and is no more conclusive in the sale of real than personal estate. Neither in the case of *Wotton v. Hele*, nor of *Lewis v. Campbell*, above named, was there any regard paid to the consideration expressed in the deed. The rule of the civil law was similar to ours, that the seller was bound to make good the value of the thing sold at the time of the eviction, whether it was more or less than the value at the time of the sale, and it is said that, in the early age of the feudal law on the continent, the lord was bound to recompense

his vassal on eviction with other lands equal in value to the value of the feud at the time of eviction. The rule in France is, or was, similar to ours, according to Pothier. The rule as to a recompense in value may have been different upon the writ of *warrantia chartas*. It is certain there could be no recovery for the increased value in consequence of the discovery of a mine, or the erection of buildings, or for the increased value of a wardship in consequence of a subsequent descent of other lands to the ward if this was set forth in a plea and the warranty was not entered into generally. But I do not know that the warrantee had the whole benefit of the rise in the value of the land, and that he could satisfy his warranty when his tenant was evicted of forty acres of land, with twenty acres of the same quality, and possibly lying adjoining the other, because the value had increased in that proportion. When the tenant availed himself of his warranty by way of rebutter, he retained the whole land, notwithstanding the increased value, and on a warranty contained in an exchange, it was said, in *Bustard's case*, 4 Co. 122, a man shall recover in value according to the value which he lost. And it is said by Perkins, that if two exchange, and then one aliens and the other vouches him, being impleaded, he shall recover in value the land given in exchange: 22 Vin. 140. I am aware it has been said that the remark in *Bustard's case* was extrajudicial; but if so, it is, at least, evidence of what was understood by a recovery in value in case of an exchange by Lord Coke, and, on that account, is entitled to some consideration.

It may, however, be immaterial at this day, to determine how the value was ascertained in the writ of *warrantia chartas*; perhaps there was no case where the land has risen in value so as to render the inquiry of any importance. In the action of covenant, in England, it does not appear to be settled that the rule of damages is the consideration of the deed, with the interest, though it may be the value at the time of making the covenant. Yet the rule is settled here, and we are not at liberty to alter it and make a new law upon the subject. The practical effect, under our betterment act, is only to give the value of the land in the situation it was in, when granted, as the buildings and improvements are usually paid for by the owner of the land when he ejects the person in possession, who entered under a deed.

The judgment of the county court is therefore affirmed.

EVICTION NECESSARY TO MAINTAIN ACTION FOR BREACH OF COVENANT OF WARRANTY: *Booker v. Bell*, 6 Am. Dec. 641; *Cummings v. Kennedy*, 14 Id. 45, and note; *Ferris v. Harshea*, 17 Id. 782, and note; *Fitzhugh v. Orogan*, 19 Id. 140; *King v. Kerr*, 22 Id. 777, and note.

MEASURE OF DAMAGES FOR BREACH OF THE COVENANT OF WARRANTY is the value of the land at the time of the eviction: *Ferris v. Harshea*, 17 Am. Dec. 782, and note 788; *King v. Kerr*, 22 Id. 777; *Markland v. Orump*, 27 Id. 230; *Cummings v. Kennedy*, 14 Id. 45, and note.

THE PRINCIPAL CASE IS CITED in *Beebe v. Swarthout*, 3 Gilm. 182, to the point that to constitute a breach of the covenant of warranty there must be a union of acts of disturbance and lawful title.

LAZELL v. LAZELL.

[12 VERMONT, 443.]

LOST NOTE NOT NEGOTIABLE, OR NOT TRANSFERRED IF NEGOTIABLE, may be recovered on in an action at law.

INDEMNITY MUST BE GIVEN BEFORE A RECOVERY can be had on a lost negotiable instrument actually transferred.

ACCEPTANCE OF A NOTE ON ACCOUNT OF A PRIOR DEBT, is *prima facie* a satisfaction thereof. This result, however, will not follow when the note is lost or destroyed.

ASSUMPSIT on a lost promissory note. The action was referred, and the facts as found are stated in the opinion. Plaintiff had judgment.

T. Hutchinson and A. Tracy, for the defendant.

J. Converse and O. P. Chandler, for the plaintiff.

By Court, BENNETT, J. It does not appear, from the report itself, that the affidavit of the plaintiff was admitted in evidence to prove the loss of the note. It is not so stated in the affidavit of the defendant's counsel, and the affidavit of the chairman of the reference expressly states, that it was rejected. The court below, then, were fully justified in finding the fact of its rejection, and it would indeed have been strange if that court had, upon the application of the defendant, set aside the report, simply on the ground that the referees had omitted to report their decision as to the admissibility of the affidavit of the party, when that decision was in his favor. The report finds that the note was given for lands sold and conveyed to the defendant, at the same time the note was given, and also the loss of the note, a demand of payment after it became due, and a refusal by the defendant. The referees are the sole triers of the facts, and their finding must be conclusive upon the parties. The law is well

settled, that, when a note not negotiable, or if negotiable by being payable to order, not negotiated, is lost, an action at law may be maintained on the note, on proof of its loss, to recover its contents. If the note is shown to have been negotiable and actually negotiated, and the evidence shows merely the loss of the paper, and not its destruction, the plaintiff's remedy is in chancery, where the court will require the party to give the maker a sufficient indemnity against the outstanding paper, before they grant him relief. If the note or bill is payable to A. B. or bearer, or to the bearer, and it is lost, the remedy in such case must also, probably, be in chancery, since the legal title to such paper passes by delivery: See Bayley on Bills, 413, 414, and notes; Chit. on Bills, 293; *Pintard v. Tuckington*, 10 Johns. 104; *McNair v. Gilbert*, 3 Wend. 344; *Welsford v. Watson*, 4 Bing. 273; *Rowley v. Ball*, 3 Cow. 303 [15 Am. Dec. 266]; *Kirby v. Sisson*, 2 Wend. 550. The referees report that no evidence was given tending to prove whether the note was payable to order or bearer or not. In *Pintard v. Tuckington* it did not appear whether the note was negotiable or not, and the plaintiff was permitted to recover at law. The same principle is sustained by the case of *McNair v. Gilbert*.

These cases proceed upon the ground, that it must, affirmatively, be made to appear that the paper was negotiable and had been in fact negotiated, or else payable to bearer, so as to pass by delivery in order to defeat a recovery at law, in the case of a loss of the instrument. If, in the absence of any proof, we were to hold that the note was to be considered negotiable by intendment, in the first instance, yet, it would be going too far to intend it was payable to bearer, or that it had been in fact negotiated by the payee, prior to its loss. It is said the plaintiff can not recover on the note, either on the first or second count, in his declaration on the ground of variance. Suppose it be so, what good reason can be shown why he may not recover on the fourth count? Though, perhaps, the better opinion may be that the acceptance of negotiable paper, on account of a prior debt, is *prima facie* a satisfaction, and that no recovery can be had on the original indebtedness, yet this is to be taken as an extinguishment of the original indebtedness, only *sub modo*, and is not to be extended to a case, in which the note is lost, or destroyed. But, in this case, the note was not given on account of a prior existing debt, and was not shown to have been negotiable; and if that was to be the intendment, still, I think the plaintiff has given a sufficient account of the note, to prevent its

operating as a merger of the original indebtedness: *Holmes et al. v. D'Camp*, 1 Johns. 34 [3 Am. Dec. 293]; *Pintard v. Tuckington*, 10 Id. 104. It is said the recitals in the deed, by which the plaintiff admitted he had received full satisfaction for the land sold to the defendant, should preclude a recovery on this count; but these recitals are but *prima facie* evidence of the payment of the consideration, and are subject to explanation: *Beach v. Packard*, 10 Vt. 96 [33 Am. Dec. 185]. The referees were the judges of the weight of this testimony, and they have found that the note in question was given towards the land.

We then think, without giving any opinion as to the plaintiff's right to recover on the money counts, that he may recover on his fourth count, and the judgment of the county court is affirmed.

WHEN AN ACTION MAY BE MAINTAINED ON A LOST OR DESTROYED NOTE, and the necessity of giving indemnity bonds, are subjects which will be found discussed in the notes to *Blade v. Noland*, 27 Am. Dec. 128, and *Edwards v. McKee*, 13 Id. 474. See, also, *Chaudron v. Hunt*, 20 Id. 60, and the prior cases in this series cited in the note.

SUFFOLK BANK v. KIDDER.

[12 VERMONT, 464.]

PENAL STATUTES OF ONE STATE ARE NOT IN FORCE beyond the limits of the state which enacted them.

CONTRACTS ARE CONSTRUED IN ACCORDANCE WITH THE *LEX LOCI*, but the remedy thereon is governed by the *lex fori*.

STATUTE OF MASSACHUSETTS, providing that in a suit on a usurious contract, recovery must be limited to the original demand, less three times the amount of the usurious reserve, applies to the remedy only, and has no force in Vermont.

WRIT of error to reverse a judgment rendered in an action on a promissory note for five thousand five hundred dollars, made in Boston on October 27, 1836, payable at the Suffolk bank, six months from date. The plaintiffs were indorsees, and sue the makers. Defendants set up the defense of usury, and claimed that the recovery was limited by a statute of Massachusetts, which, together with the further facts, are stated in the opinion. Verdict was given for the plaintiffs for the amount of the note, less three times the amount of the usurious reserve.

T. Hutchinson, for the plaintiffs in error.

A. Tracy and J. Converse, for the defendants in error.

By Court, BENNETT, J. It has long been settled law, that the penal statutes of one state have not the force of law beyond the limits of the state which enacted them; and it is contended that the statute of Massachusetts, now in question, is of that character. It is sometimes difficult to determine the precise class or division to which a statute may belong, and the divisions themselves seem sometimes not to be very well marked; but it is not necessary, in this case, that we should decide to which class of statutes the one now in question belongs.

The second section of the statute, set forth in the plea, enacts, expressly, that no contract containing usury shall be thereby rendered void, but provides that whenever any action shall be brought upon such contracts, and it shall appear upon a special plea to that effect, that the contract was usurious, the defendant shall recover his own costs, and the plaintiff shall forfeit three times the amount of the whole interest reserved, and shall have judgment for the balance only. Three times the amount of the whole interest is to be deducted from the plaintiff's demand. This statute can have but one construction. It declares that the contract shall not, by means of usury, be rendered void; and, in construing and giving effect to a contract, the *lex loci* must govern the rights of the parties; but the *lex fori* obtains as to the remedy. We must administer justice according to our laws, and agreeably to the forms prescribed by our legislature, or the practice of our courts. We can not, in respect to the remedy, notice the statutes of the state in which the contract was made. In the provincial government of Lower Canada, they have an act which provides that suits shall be brought, on notes of hand, within five years, or they shall be considered as paid and discharged, if the debtor shall make oath of their payment. In *Cartier v. Page*, 8 Vt. 146, it was held that this statute related to the remedy, and prescribed the mode of proof, and could have no effect in this state. So it is with all statutes of limitation. The legislature of Connecticut passed a law which prohibited attorneys, sheriffs, etc., from purchasing choses in action, and among other things, provided that the defendant might, when sued, file his motion, stating that he believed the demand was purchased contrary to the provisions of the act, and praying the court to inquire into the truth of the same; and that if, upon inquiry, it should be so found, the plaintiff should become nonsuit. In *Scoville v. Canfield*, 14 Johns. 338 [7 Am. Dec. 467], this statute was interposed as a defense in a case which arose in Connecticut, both parties at

the time being citizens of that state, and it was held that it could have no effect in New York.

The statute of Massachusetts is not, in its terms, professedly addressed to the courts of other states, and, had it been, it must have been nugatory. It says, "whenever an action shall be brought," etc. This must evidently refer to actions in their own courts. The effect of the statute is to leave the usurious contract in force, but bars the plaintiff from a recovery beyond the balance due, after deducting treble the whole amount of interest reserved in the contract. So far the statute, upon the proper plea, bars the plaintiff's right, and is as much a statute relating to the remedy, as one which bars an action after six years. The statute also gives the defendant his cost. This part of the statute so clearly relates to the course of proceeding in the courts of Massachusetts, that there has been no attempt to carry it out in this case.

We are the more confirmed in our views of this case from an examination of other sections of this act, which are not brought to view by the pleadings in this case. By the third section there is a provision that if the whole demand is paid without any deduction, the party paying it may recover back the part forfeited, either in a suit at law, or by bill in chancery; and, by the fourth section, on the question of usury, both parties may be witnesses. It is evident, then, from all the provisions of this act, that it was the intent of the legislature of Massachusetts to regulate the course of proceedings in their own courts. As such, it must be left to have its operation within the jurisdiction of that state, and can not furnish a rule for the courts of this state.

The judgment of this court, then, must be, that there is error in the record and proceedings of the county court, and the judgment of that court is reversed.

LEX LOQI GOVERNS in determining the rights of the parties to a contract: *Ramsey v. Stevenson*, 12 Am. Dec. 472; *Lynch v. Postlethwaite*, 19 Id. 495, and note. See, also, *Touro v. Cassin*, 9 Id. 680; *Scoville v. Camfield*, 7 Id. 467; *Malpica v. McKown*, 20 Id. 279; *King v. Harman*, 26 Id. 485, and cases cited in the note thereto.

CHAMBERLAIN v. WILLSON.

[12 VERMONT, 491.]

WITNESS NEED NOT ANSWER A QUESTION, when by so doing he will be exposed to a prosecution for a crime, or a penalty.

REFUSING TO TESTIFY CONCERNING MATTERS TENDING TO CRIMINATE himself, is a privilege which a witness may waive. If he waive the privilege, he must submit to a full cross-examination.

STATEMENT BY A WITNESS, UNDER OATH, THAT HE CAN NOT TESTIFY without criminating himself, is sufficient proof of the same, unless the court is satisfied that the witness is mistaken, or acts in bad faith.

TRESPASS. On the trial a witness was asked by the plaintiff to state what he knew, or what the defendant had stated to him about the trespass, but he refused to answer on the ground that by so doing he would expose himself to punishment. The court sustained the witness, and defendant had verdict.

A. Underwood, for the plaintiff.

Parker and Austin, for the defendant.

By COURT, REDFIELD, J. It is well settled, that a witness is not bound to answer any question, the answer to which might tend to criminate him, *i. e.*, expose him to a prosecution for crime, or penalty. It is doubtless true, that this is not the most effectual mode of shielding the witness; for the mere fact of claiming the privilege tends very much to show him guilty of the offense. A rule that the testimony should be given in all cases, but should never after be used for the purpose of procuring a conviction of crime, would be more conducive to the reasonable ends of justice, and at the same time afford full protection to the witness. But such is not the law. It is well settled, that the testimony, if freely given, may be afterwards used against the witness. I know indeed of no rule to exclude the testimony being given in evidence against the witness, even in a prosecution of a criminal nature, although the witness were compelled to testify under the requisitions of a court of justice. It is obvious, then, that the only security of the witness is in silence. The rule should be so administered as to afford full protection to the witness, and at the same time escape simulated excuses.

It is the privilege of the witness, and he may waive it. And if he submit to testify about the very matter tending to criminate himself, without claiming his privilege, he must submit to a full cross-examination. In 22 Eng. Com. L. 244, n. a,¹ Lord Tenterden, C. J., said, the objection belonged to the witness, and he would not allow the counsel to argue it. In the case of *Dixon v. Vale*, 11 Id. 391,² the witness, before testifying to the principal matter, was cautioned, and told that he was not obliged to testify, but he still chose to go forward, and the court would

1. *Thomas v. Newton*, Moo. & M. 48; 21 Eng. Com. L. 468.

2. 12 Eng. Com. L. 167; 1 Car. & P. 278.

not suffer him afterwards to retract his waiver of the privilege. In all cases, where the question, tending to elicit matters involving the witness in a suspicion of crime, first arises on cross-examination, the witness is still allowed his privilege, unless he has understandingly waived it: *Rex v. Pitcher*, Id. 323.¹ In this latter case the question seemed to be wholly collateral to the principal issue, and tending rather to disgrace the witness, than to show him guilty of crime. But the rule is well settled, that the privilege must be claimed by the witness. Ordinarily, I apprehend, when testimony is expected from a witness, so situated as to be interested in this privilege, he should be told, either by the counsel or by the court, at the suggestion of the counsel, that if the matter will tend to criminate him he is not obliged to testify; but if he begins, he is then bound to make a full disclosure.

From this view of the subject, it is obvious that the witness must first determine whether he can make a full disclosure without stating any fact, tending, in any degree, to criminate himself. If he informs the court, upon oath, that he can not testify without criminating himself, the court can not compel him to testify, unless they are fully satisfied such is not the fact, i. e., that the witness is either mistaken, or acts in bad faith, in either of which cases the court should compel the witness to testify.

From the facts detailed in the bill of exceptions, in the present case, it is very certain the court did right in not compelling the witness to give testimony, and their judgment must be affirmed.

THE PRIVILEGE OF A WITNESS in refusing to answer questions which tend to criminate himself, is fully discussed in the note to *Fries v. Brugler*, 21 Am. Dec. 52.

SPAULDING v. CHAMBERLIN.

[12 VERMONT, 538.]

RECORD OF A JUSTICE OF THE PEACE IS AS CONCLUSIVE as that of any other court. It can be tried by inspection only, and is conclusive of every fact stated therein, until regularly set aside.

TRESPASS for false imprisonment. Defendant justified under an execution issued by a justice of the peace. Plaintiff offered evidence to show that the original writ in the action in which the execution issued, had been altered by the erasure of one jus-

tice's name, and the insertion of the name of the one who rendered the judgment. The court excluded the evidence. Verdict was given for the defendant.

T. Bartlett, for the plaintiff.

W. Upham and G. C. Cahoon, for the defendant.

By Court, COLLAMER, J. The defendant justified under the judgment of a justice of the peace, and he showed the judgment by a duly certified copy of the record. The plaintiff proposed to show by parol, in effect, that there was, in fact, no such process or judgment. A justice's record is as conclusive as that of any other court. It can be tried by inspection, only, and is conclusive of every fact stated in it, until regularly set aside. This record showed that a writ, duly signed by this justice, issued and was served and a judgment by him was duly rendered. Therefore the plaintiff could not be permitted to prove that the writ, when issued, was not signed by him, or to prove the judgment was not so rendered.

Judgment affirmed.

STEVENS v. BEACH.

[12 VERMONT, 585.]

QUESTIONS MAY BE ASKED UPON CROSS-EXAMINATION to test the accuracy or veracity of a witness.

WITNESS CAN NOT BE IMPEACHED BY SHOWING THE FALSITY of his testimony concerning facts collateral to the issue.

CONTINUANCE OF A TRIAL by a justice of the peace, made in the absence of the parties, is not binding.

AUDITA QUERELA to vacate a judgment of a justice of the peace. It appeared that at the time the case in which the judgment was rendered was set for trial, the plaintiff herein did not appear. The justice continued the cause until eleven o'clock. Upon the arrival of that hour, and in the absence of the plaintiff, a default was ordered. Before that order was entered, however, Steele, the attorney for the plaintiff, appeared, and demanded that the default be set aside. This the justice refused, and judgment was accordingly entered. The further facts appear in the opinion.

No appearance for the complainants.

Ira Young, for the defendant.

By Court, REDFIELD, J. In this case, the plaintiff's witness,

Steele, had testified that, in passing a certain point on the road, he made no delay, and did not turn aside from the main road. A witness on the part of the defendant, testified that, at this point, Steele's horse did turn aside from the main road, and stood grazing for a long time. The plaintiff then, in reply, offered to prove by witnesses who had not before testified, that Steele's horse did not turn aside from the main road, and the court rejected the testimony. If the fact, whether Steele's horse turned aside from the road to graze, had been directly in issue in the case, the testimony offered by the plaintiffs must have been received; but that fact was no way material to the principal issue. It could not be important, except to impeach the defendant's witness or corroborate the plaintiff's. It is no doubt competent for the party to put almost any question, upon cross-examination, which he may consider important to test the accuracy or veracity of the witness. But if the question is in regard to a fact collateral to the issue, he must be content with the answer of the witness, and can not contradict him by independent proof. If this were allowed, a single issue would branch out into an indefinite number of collateral ones: 1 Stark. Ev. 182, 6th ed., and authorities referred to. Hence, if in regard to any of those collateral questions, the witnesses should not agree, it is not, for the reason above stated, competent for either party to adduce evidence in regard to such collateral fact. The question put to Steele, for the purpose of testing his consistency, might be perfectly competent, but the testimony given by the defendant's witnesses upon this point, as it had no tendency to prove the main issue, was not competent, and, had it been objected to, would have been rejected. Hence, as Steele could not legally have been impeached by this collateral proof, neither could he be supported in that manner.

In regard to the order of the justice, that the case should stand open until eleven o'clock, it is obvious that it was made with reference to the time, as indicated by the chronometer then before the eye of the court, and not to the apparent or true time, as determined by meridional observations. If this were not so, even, it was an order no more binding upon himself or the parties, than a mere mental resolution, which all mankind are permitted to forego at will.

Judgment affirmed.

IMPEACHMENT OF WITNESS.—For a full discussion of this subject, see the note to *Blue v. Kibby*, 15 Am. Dec. 96, and the cases cited therein.

ATKINSONS v. ALLEN.

[12 VERMONT, 619.]

INCOMPETENCY OF A JUROR IS NO GROUND FOR ARRESTING JUDGMENT, although it may be good cause for a new trial.

IMPANELING A JUROR ON A FORMER TRIAL, if no verdict or other expression of opinion is given, is not a sufficient ground for challenge.

JUDGMENT IN AN ACTION OF EJECTMENT can not be collaterally attacked by any of the parties or their privies; but strangers may show that such judgment was fraudulent and collusive, and obtained by an attorney without any authority from his assumed client.

EJECTMENT. Plaintiffs derived their title from one John Atkinson, who, by himself and grantees, had been in possession of the land from 1806 until 1829, when they were evicted by one Alpha Allyn. They did not connect their title with that of Murray, the original owner. Defendant offered in evidence the record of a judgment obtained in 1833, in favor of Murray, against Alpha Allyn, for the possession of the premises, and showed that he was in possession as the agent of Murray. Plaintiffs then, against defendant's objection, gave evidence to show that such judgment had been obtained without the consent of Murray, and was collusive and fraudulent. The further facts appear in the opinion. Plaintiffs had verdict.

Johnson, and Cooper and Redfield, for the defendant.

Fletcher and Bartlett, for the plaintiffs.

By Court, REDFIELD, J. The fact that the county court suffered a juror to sit in the trial of the cause, who was legally incompetent, was no ground for arresting the judgment. It was undoubtedly good ground for a new trial; and, probably, would have been good ground for reversing the judgment on exceptions, or writ of error: *Boardman v. Wood*, 3 Vt. 570. But the mere fact that a juryman sat in the case, on a former trial, or had formed an opinion, if he had not given a verdict, or in any other way expressed that opinion, constituted no sufficient ground of challenge. This is very satisfactorily shown by the chief justice, in the opinion delivered by him, in the case last cited, where he goes into an elaborate revision of the decisions upon this subject. The rule is adhered to in the case of *French v. Smith*, 4 Vt. 363 [24 Am. Dec. 616]. In the present case, it did not appear that the jurors had even formed an opinion.

The only remaining objection made to the proceedings in the court below is, that the plaintiffs were suffered to attack the judgment in favor of Charles Murray against Alpha Allyn, collaterally, by showing that it was not *bona fide*, but colorable merely,

got up by Allen to shield himself and his tenant, the defendant—Murray having no knowledge of the proceedings. It is obvious, that as the plaintiffs, and those under whom they claim title, had possession of the premises prior to Alpha Allyn, and were forcibly ousted by him, they can upon this first seisin only, recover of Allen and all who have entered, either under him, or upon his possession, whether with or without his consent, unless they can shield themselves under a title older and better than that of the plaintiffs. This they attempted by force of the judgment in favor of Murray, the original proprietor, against Alpha Allyn, he being put out of possession, and the present defendant and those under whom he claims title, being put in under color of this judgment. This judgment the plaintiffs were permitted to avoid, by proof addressed to the jury, in the manner above stated. As the plaintiffs were neither parties, nor privy to this judgment, and could have brought no process or suit whatever to reverse or set it aside, they must be permitted to avoid the effect of the judgment in this manner, if at all. The rule that a judgment of a court of competent jurisdiction is conclusive, until reversed or in some manner set aside or annulled, and that it can not be attacked collaterally, by evidence tending to show that it was irregularly or improperly obtained, only applies to parties and privies to the judgment, who may take proceedings for its reversal, and in no sense extends to strangers.

It is obvious, if the facts found by the jury in this case are to be regarded, that the defendant is the tenant of Alpha Allyn, and has no more connection with the title of Murray, than if he had attempted to show title from him, by means of a forged deed. And it is not, for a moment, to be tolerated, that the rights of parties to the title of lands, are to be shifted and postponed, to their juniors, by merely colorable proceedings of this character. This mode of redress has always been allowed to strangers or third persons: *Duchess of Kingston's case*, 11 State Tr. 230; *Crosby v. Leng*, 12 East, 409; *Lloyd v. Maddox*, Sir Fr. Moore, 917; 11 State Tr. 262; 1 Stark. Ev., 6th ed., 259.

The judgment of the county court is affirmed.

COLLATERAL ATTACK ON JUDGMENT: See note to *Nason v. Blaisdell*, *ante*, 331, and cases cited.

THE PRINCIPAL CASE IS CITED in *Ingalls v. Brooks*, 29 Vt. 400; *Williams v. Martin*, 7 Ga. 382; *Wilhelmi v. Leonard*, 13 Iowa, 342; *Kittredge v. Emerson*, 15 N. H. 284, to the point that a fraudulent judgment may be attacked collaterally by third persons.

BLOOD v. ENOS.

[12 VERMONT, 625.]

CONTRACT FOR THE PERFORMANCE OF WORK AND LABOR MAY BE RESCINDED by a naked agreement to that effect.

RESCISSION OF A CONTRACT IS A QUESTION OF FACT for the jury.

QUANTUM MERUIT MAY BE RECOVERED for work done under a special contract upon the rescission of the same without any fault on the part of the plaintiff.

MEASURE OF DAMAGES, IN SUCH CASE, is the value of the labor at the price agreed upon, less whatever damage the defendant has suffered by reason of the failure to complete the contract.

ASSUMPSIT in two counts. The first count set forth, in substance, that plaintiff contracted to clear a certain piece of land for defendant, at the rate of six dollars and fifty cents per acre, by the first of November, 1836. That in consideration therefor and as part payment, defendant sold and delivered to plaintiff a yoke of steers, which were to become his property upon the completion of the contract. There was also an allegation of the breach of this contract by the defendant, in retaking the yoke of steers, and of part performance by the plaintiff. The second count was for work and labor in common form. Plaintiff had verdict.

Cooper and Redfield, for the defendant.

C. W. Prentiss, for the plaintiff.

By Court, REDFIELD, J. The defendant complains of certain parts of the charge of the county court. 1. The jury were told they might give a verdict for the plaintiff, on the ground that he was released or exonerated from further proceeding in the work, by the mutual agreement of the defendant and Harrison Blood. Of the propriety of this part of the charge there can be no doubt. It is always competent for the parties to rescind a subsisting simple contract by a naked agreement to that effect. Whether this was the intention of the parties, is to be determined by the jury from what passed between them. 2. The jury were told, that if the defendant interfered and took the cattle away, without just cause of dissatisfaction, this would be such a violation of the contract as would justify the plaintiff in abandoning the contract. Of this, I apprehend, there can be no doubt. If the defendant violated the contract, on his part, and by taking away the cattle, without cause, put it out of the plaintiff's power to proceed with the contract, he must be permitted to recover for the labor he had performed. Whether the defendant acted on-

priciously and without good reason, was a question for the jury, and which they have determined against him, which determination can not be revised here.

Upon the general ground, too, that plaintiff had performed labor on the defendant's land, which must go for his benefit, and which the plaintiff could not remove, he was entitled to recover as much as he had, upon the whole, benefited the defendant: *Dyer v. Jones*, 8 Vt. 205; *Heywood v. Leonard*, 7 Pick. 181.¹ The rule of damages, in these cases, seems to be to allow for the labor at the price agreed, and deduct the defendant's damages, which was, substantially, the rule given to the jury in this case. So that upon any view of the case, we do not perceive how the defendant had any just cause of complaint, so far as the charge was concerned. The defendant offered to prove that, at the time the plaintiff left the country it was "reported" he had absconded. The fact whether he had absconded or not, was wholly immaterial, if he had left some one to fulfill this contract, which was the fact, and which the defendant learned before he took the cattle away, but that fact could not be shown by common report. We think the court below committed no error.

Judgment affirmed.

RECOVERY ON A QUANTUM MERUIT when there is a special contract: See *Merrill v. Ithaca etc. R. R.*, 30 Am. Dec. 130, and the prior cases in this series cited in the note thereto.

THE PRINCIPAL CASE IS CITED IN *Holmes v. Doane*, 9 Cush. 139, to the point that a contract may be rescinded by the verbal agreement of the parties, and a new one established having the former one as its basis, without a further consideration.

HARRISON v. EDWARDS.

[12 VERMONT, 648.]

PROMISSORY NOTE PASSING BY DELIVERY, will be presumed to have come into the possession of the holder before maturity.

PAYMENTS MADE ON A PROMISSORY NOTE BEFORE MATURITY can not be offset against a *bona fide* holder for value, whose title accrued before the note became due.

LAW OF THE PLACE WHERE A CONTRACT IS TO BE PERFORMED governs in determining the rights of the parties to a contract entered into in one country to be performed in another.

LEX FORI GOVERNS IN DETERMINING THE MODE OF TRIAL, including the form of pleading, the quality and degree of evidence, and the mode of redress.

1. *Heywood v. Leonard*; 8 C., 19 Am. Dec. 268.

ASSUMPSIT on a promissory note brought by plaintiff as holder. The note declared on was executed in the state of New York, where the parties resided, payable to Zuriel Waterman or bearer, for fifty dollars and interest, dated November 12, 1832, and payable on February 1, 1835. Defendant set off a promissory note, dated February 7, 1832, given by Waterman to the defendant, for one hundred and forty-five dollars and ninety-eight cents, payable in August, 1832, and introduced in evidence a receipt in full for all demands, executed by Waterman to the defendant, dated April 6, 1833. Plaintiff had judgment.

S. A. Willard and L. P. Poland, for the defendant.

H. P. Smith, for the plaintiff.

By Court, REDFIELD, J. Although it does not appear in proof, in this case, at what time the note now in suit, came into the hands of the plaintiff, the note, passing by delivery, will be presumed to have come to the plaintiff while it was still current, and before its maturity. Under this state of facts, by the rules of the common law, which obtain in the state of New York, the defense offered can not prevail. No payment made to the payee of a negotiable promissory note, while the same is not yet overdue, will avail the maker of the note, as against a *bona fide* holder for value, whose title accrued before the note became due. But by the law of this state, then in force, such defenses would avail the maker, although the law is otherwise in this state, at the present time. The defendant insists, that this law of Vermont will now avail him in his defense; but the court think otherwise. All the parties to this note, at the time of its execution, negotiation, and payment, resided in the state of New York, where these several contracts were executed. It is obvious, then, that the law of that state must govern those incidents.

It is a well-settled rule, in regard to the construction of contracts, that their validity and extension, as well as performance or release, must be determined by the law of the place of contract. These incidents are to be determined by that law, for the reason that the parties are presumed to have contracted with reference to that law only, and, to determine these matters by the law of any other place, would be to contravene the probable intention of the parties. Hence, when the parties, although contracting in one country, are domiciled in another, where the contract is to be performed, the *lex loci domicilii* will prevail. And when the parties enter into a contract in one

place, to be performed in another place, the matters of payment, tender, or release, will be governed by the *lex loci solutionis*.

It is true, indeed, that the mode of trial, by which is meant the form of pleading, the quality and degree of evidence, and the mode of redress, must always be determined by the law of the place of trial. No forum, in which a remedy is given to foreigners, or upon foreign contracts, is expected to adopt the forms of trial of the foreign country. Hence, in the present case, the mode of pleading or proving this payment or set-off, must be determined by our law now in force, and not the law in force at the time the transactions happened; but the effect of the defense in precluding a recovery, whether as a payment or offset, must be determined by the *lex loci contractus*.

Judgment affirmed.

LEX LOCI CONTRACTUS, WHEN GOVERNS in determining the rights of parties to a contract: See the cases cited in the note to *Suffolk Bank v. Kidder*, ante, 354.

LEX FORI GOVERNS IN DETERMINING THE REMEDIES to a contract: *De Sobry v. De Laistre*, 3 Am. Dec. 535; *Scoville v. Canfield*, 7 Id. 467; *Atwater v. Townsend*, 10 Id. 97; *Gulick v. Loder*, 23 Id. 711.

WILSON v. HOOPER.

[12 VERMONT, 653.]

CHANGE OF POSSESSION OF PERSONAL PROPERTY upon a sale thereof is necessary, in order to protect the rights of the vendee.

POSSESSION IS SUFFICIENTLY CHANGED upon the sale of a farm with the personal property thereon, upon which neither of the parties reside, if the vendee records his deed, enters upon the premises, and assumes the entire control thereof.

VENDOR ASSISTING A VENDEE TO THRESH GRAIN in a barn, being part of the property conveyed, is not such a retention of possession as will render a sale fraudulent and void as to the creditors of the vendor.

TRESPASS for certain personal property. The defendants attempted to justify the taking by virtue of a writ of attachment in favor of the defendant Hooper against Jotham Wilson, the vendor of the property. The further facts appear in the opinion. Defendants had verdict.

J. Sawyer, for the plaintiff.

L. B. Vilas, for the defendants.

By Court, BENNETT, J. The rule of law that requires a substantial change in the possession of personal property, upon a

sale, in order to protect the rights of the vendee, is one of policy, and upon no other ground can a court be justified in holding a sale fraudulent, *per se*, which, to a jury, is proved to be *bona fide*, and, in fact, free from the imputation of any fraud. It may well be supposed that every person, so long as he is the owner of property, needs, for his own convenience and use, the possession of it, and if upon the sale, the vendor is required to surrender up the possession, it will be a great clog upon fraudulent sales, and tend to prevent a collusive credit. Though many of our sister states have repudiated the doctrine of fraudulent sales, *per se*, yet experience shows it to be a doctrine founded in the soundest policy, and from which we have no disposition to recede. It should, however, have a reasonable application, and be so applied as to carry out the ends of the rule, and prevent the mischiefs which it was intended to prevent, and no further. Hence, our courts have held that it does not apply to the sale of such property as is exempt from execution, nor to property in the hands of a bailee, at the time of the sale, the vendee having given him notice of the sale. The only question in the case is, do not the facts reported in this bill of exceptions, show such a change in the possession of the property, which is the subject of this suit, as a sound application of the rule requires? The property was conveyed to the plaintiff by a bill of sale, on the fifth day of October. The farm upon which the property was located, was conveyed to the plaintiff by deed, bearing date — day of October, but acknowledged on the fourth, and recorded in the forenoon of the sixth of October, and the property was attached on the evening of the sixth. The vendor did not live upon the farm conveyed, and the case finds that the plaintiff had entered upon the premises, though he did not live upon them, and commenced threshing in the barn containing a part of the property conveyed, and that the vendor delivered up to the plaintiff all control of the property in question. What more should he have done? If a man buys a farm with the personal property upon it, and takes his deed, puts it on record, and enters upon the premises, though his family do not reside upon them, and assumes an exclusive control of the property, the vendor and his family not living upon the farm, is not this all the change in the possession that reason or law can require? To go further than this would be productive of mischief and of no good.

It can hardly be contended that, from the fact that the vendor was threshing with the plaintiff after he had entered upon the

premises under his deed, there was a concurrent possession of the property in the vendor and the plaintiff, especially as the case states that he had surrendered up all control of it to the plaintiff; and there is nothing in the case to show that the vendor, after the sale, had any beneficial use in the possession of the personal property, or exercised any acts of possession over the real estate. The inference, I think, from the case, is, that the vendor was acting as the hired man or servant of the plaintiff. If, however, the case was made to turn on the question of fact of there being a concurrent possession, this should have been submitted to the jury. In the original case, as allowed by the judge, it is true, the attachment appears to have been made on the fifth of October, the day before the deed was put on record; and this was probably supposed to have been the fact in the court below; but upon reference to the writ and service, which we must regard as a part of the case, the writ was not served until the sixth. And we must so treat this bill of exceptions. None of the cases cited by the defendant's counsel present an analogous state of facts with those which are detailed in this case. On the whole, then, we think there was a sufficient change in the possession of this property, prior to the attachment; and if the sale was, in fact, *bona fide* and upon sufficient consideration (which, for the purposes of this question, we are to take for granted), the plaintiff should be protected in his rights.

Judgment of the county court reversed.

RETENTION OF POSSESSION OF CHATTELS BY VENDOR, EFFECT OF: See the cases in this series collected in the note to *Richmond v. Cradup*, 33 Am. Dec. 164.

WELCH v. CLARK.

[12 VERMONT, 681.]

TENANT IN COMMON CAN NOT MAINTAIN TROVER OR TRESPASS against his co-tenant in reference to personal property, unless there has been a destruction of the chattel.

SALE OF AN ENTIRE CHATTEL, HELD IN COMMON by one of two co-tenants, without the consent of the other, is not equivalent to a destruction.

TENANT IN COMMON IS NOT DIVESTED OF ANY RIGHT by a sale by his co-tenant, but becomes a tenant in common with the purchaser.

ATTACHMENT OF A CHATTEL, HELD IN COMMON, on a process against a co-tenant, is not such a destruction of the property as to give the other tenant a right to an action of trespass or trover against the attaching creditor or the sheriff.

TRESPASS for taking a mare which the evidence showed was held in common by the plaintiff and W. C. Clark. Defendant justified the taking by virtue of an attachment against said W. C. Clark, and a sale thereunder to himself. The further facts appear in the opinion. Defendant had verdict.

J. Sawyer, for the plaintiff.

Willard and Poland, and Macck and Smalley, for the defendant.

By Court, BENNETT, J. Can this action be sustained upon the facts disclosed in this bill of exceptions? We think not. The court, in substance, charged the jury that if they found that the plaintiff and William C. Clark were tenants in common of the mare in question, the plaintiff could not recover. The general rule is, that one tenant in common can not maintain trespass or trover against his co-tenant, because they have each an equal right to the possession of the chattel, and the law gives no action to the one dispossessed, because his right is not superior to the right of the other. It is, however, equally well established, that, if there has been a destruction of the chattel by one co-tenant, the other, in such case, may maintain the action; and it has been held that the sale of an entire chattel, held in common, by one of the co-tenants, without the consent of the other, is equivalent to a destruction. This, however, can not be regarded as settled law. In the case of *Heath v. Hubbard*, 4 East, 128, the court intimate a different opinion, while in the case of *Barton v. Williams*, 5 Barn. & Ald. 395, great doubt is entertained whether the effect of such sale would not amount to a conversion, and some of the court think it would. In the case of *Daniels v. Daniels*, 7 Mass. 137, Chief Justice Parsons says, trover will not lie by one or more of the heirs against the other heirs for the conversion of their title deeds, unless they are absolutely destroyed. In *Oviatt v. Sage*, 7 Conn. 95, there had been a sale by one co-tenant of the entire chattel, and Judge Daggett says, "that nothing done by one tenant in common of a chattel, short of a destruction of it, will render him liable to his co-tenant in tort, and that this is familiar law." In the state of New York, in the case of *Wilson and Gibbs v. Reed*, 3 Johns. 175, it was expressly adjudged that if one tenant in common of a chattel sell it, an action of trover will lie against him by the other co-tenant. This case is not supported by any adjudged case, cited either by the counsel or by the court, though it has been regarded as settling the law in that state. In the case of *Tubbs v. Richardson*, 6 Vt. 442 [27 Am. Dec. 570], where

the parties were tenants in common of a quantity of wool in the possession of the defendant, and he had sold a part of it and retained the rest, claiming the whole as his own, and refused to deliver any portion of it to the plaintiff on demand, it was held that trover would not lie, even for a moiety of what had been sold.

I am not aware of any adjudged case in this state, that trover could be sustained upon a sale of the entire chattel held in common, and perhaps there may be some reason to question the soundness of the doctrine in the state of New York on this subject. If one of two tenants in common take the whole chattel into his possession, the other has no remedy against him who has done the wrong, but to take it himself out of his possession when an opportunity presents. And, if one tenant in common sells the whole chattel without the consent of the other tenant, the purchaser acquires a right to the possession of the whole chattel, as tenant in common, the possession of one being the possession of both, but a title to one moiety only.

The tenant is not divested of any right by the sale of his co-tenant, but becomes a tenant in common with his purchaser, who succeeds to all the rights of a tenant in common. How, then, is such a sale equivalent to a destruction of the chattel? No doubt, the tenant may, at his election, affirm the sale, and sustain his action against his co-tenant for a moiety of the consideration received. But, if he brings his action for the tort, this is not an affirmation of the sale, though, probably, a recovery and satisfaction in trover against the co-tenant, might have the effect to vest the entire chattel in the purchaser. It is not necessary, however, in this case, for the court to decide upon the effect of a sale of a chattel by a co-tenant, and, whether, if upon such sale trover will lie, there should be a distinction between trover and trespass.

This mare, while in the possession of William C. Clark, had been attached on two several writs, and was, at the time of the attachment by the defendant, in the custody of the law. The defendant's writ was served by the same officer, which would have the effect to give him a lien, subject to the two first attachments; but he would have no right in, or control of the property, only as subject to the two first attachments. The mare was sold to satisfy the two first liens; but there were no proceedings, in regard to the sale of the mare, on the defendant's execution. The defendant, in this case, as the creditor of William C. Clark, as it respects the plaintiff, relies upon his rights and

stands in his place. The defendant had the right to attach, at least, all the interest William C. Clark had in the mare, as tenant in common with the plaintiff, and the officer had, by virtue of such attachment, the right to take the entire and exclusive possession of the mare, subject only to the prior attachments, to the dispossession of the plaintiff. *Reed and Root v. Shepardson*, 2 Vt. 120 [19 Am. Dec. 697]; *Whitney v. Ladd*, 10 Id. 165. In *Heydon v. Heydon*, 1 Salk. 392, it was held that the sheriff, in the case of copartners and judgment against one, in levying the execution upon the goods of the partnership, must seize all, because the moieties are undivided; for, it is said, if he seize but a moiety, and sell that, the other will have a right to a moiety of that moiety; therefore, he must seize the whole, and sell an undivided moiety, and the vendee will then be a tenant in common with the other partner. The same reason will apply to tenants in common. It is, then, very manifest that the attachment of a chattel, held in common, on a process against one of tenants in common, as his sole property, can not in any point of view be considered equivalent to a destruction of the chattel, so as to give the other tenant the right to an action of trespass or trover against the attaching creditor, who succeeds to the rights of one of the tenants, or the officer who made the attachment.

The fact that the officer, after the sale of the mare on the two first executions, applied the surplus of the money remaining after the satisfaction of those executions, on the defendant's execution, can have no effect in this action. The officer held such surplus in trust for those who were entitled to it, and must, at his peril, make a legal application of it. If the defendant is not entitled to retain it, he might be compelled to refund it, in an action for money had and received, but his reception of it can have no possible effect in this case.

As this is an action of trespass, there is another ground which is fatal to the plaintiff's right of recovery. To sustain trespass, the plaintiff must have either the actual or constructive possession of the chattel, at the time of the trespass complained of. He must have such a right as to be entitled to reduce the goods to actual possession when he pleases. In this case, the plaintiff's right to the possession of the mare, at the time of the defendant's attachment, was, for the time being, tolled by the prior attachments, the mare then being in the custody of the law, and the plaintiff, not having, at that time, the actual possession nor the right of possession, could not, for this cause, maintain trespass.

The charge of the court to the jury, that if they found the young horse, which was had of right, was owned by the plaintiff and William C. Clark jointly or in common, and that this horse was turned out in part payment of the mare in question, they ought to infer (in the absence of any contract or evident understanding shown to the contrary) that they had a common interest in the mare in question, is most certainly unexceptionable. If the consideration paid for the mare in question moved from the plaintiff and William C. Clark, the effect of it, in the absence of any proof to the contrary, would be to vest the property in those who paid the consideration for it, and, indeed, this part of the charge was not resisted in the argument of the case. The result is that the judgment below is affirmed.

TROVER OR TRESPASS MAY BE MAINTAINED BY ONE TENANT IN COMMON against another, only upon the destruction of the common property, or upon such a disposition as is tantamount thereto: *Lucas v. Wasson*, 24 Am. Dec. 206; *Bell v. Layman*, 15 Id. 83; *Hyde v. Stone*, 22 Id. 582. The general subject of when trespass will lie by one co-tenant against another, is discussed in the note to *Porter v. Hooper*, 29 Id. 483. A majority of the cases are opposed to the principal case, and sustain the view that the sale by one co-tenant of the property of the co-tenancy, as if he owned the whole, is a conversion of the moiety of his co-tenant, and will support an action of trover by the latter: *Freeman on Co-tenancy and Partition*, sec. 310.

ISAACS v. CLARK.

[12 VERMONT, 692.]

MATTER OF ESTOPPEL, TO HAVE EFFECT, MUST BE PLEADED, except where there has been no opportunity so to do, in which case it may be given in evidence with the same conclusive effect as if pleaded.

VERDICT OF A JURY ON FACTS DIRECTLY IN ISSUE in one case, is conclusive as to such facts, in a subsequent case between the same parties.

ASSUMPSIT, for use and occupation of certain lands. Defendant claimed that he had surrendered the premises to the plaintiff, who had let them to another person. To defeat this claim of the defendant, the plaintiff introduced a copy of the record of a former action between the same parties, for the use and occupation of the same land, in which the jury had found the fact of surrender adversely to the defendant. Defendant then sought to introduce evidence to defeat the finding of the jury on the question of surrender, which was excluded by the court. Plaintiff had verdict.

Willard and Poland, for the defendant.

J. Sawyer, and Maeck and Smalley, for the plaintiff.

By Court, BENNETT, J. It is at least a familiar principle of law, that, when a fact, appearing to have been put directly in issue on the face of the pleadings, is determined by a jury in one case, the verdict, when properly pleaded in a subsequent suit between the same parties, is conclusive as to the facts found by the verdict in the first case. This is by way of an estoppel; and, it is usually said that, to give it this effect, it must be pleaded as an estoppel. It is, no doubt, true that where the party has an opportunity to plead the estoppel, he is bound to do it; and, if he omits it, the jury will not be bound by the estoppel, but may find according to the fact. If, however, there has been no opportunity to plead the matter as an estoppel, it may, in general, be given in evidence, and it will have the same conclusive effect as in cases where it is pleaded. This is according to the current of the authorities, though they may not have been entirely uniform: Hob. 207;¹ 1 Salk. 277;² 1 Ph. Ev. 224, 225; 14 Mass. 243;³ 3 Cow. 120;⁴ 6 Wend. 289;⁵ 17 Serg. & R. 319;⁶ 1 Swift's Dig. 622; 8 Vt. 461.⁷ It seems from this bill of exceptions, that the fact whether there had been a surrender of the premises by the defendant, for the use of which the rent is claimed, on the former trial between these same parties, was put distinctly in issue by them, and by the court in their charge to the jury, and that issue was found for the plaintiff. This action, being brought for rent claimed to have accrued since the former recovery, the defendant, after pleading the general issue, claims, on trial, that though he took the premises of the plaintiff under a contract to pay rent, yet he had surrendered them to him, and that the plaintiff accepted the surrender, and let them to another tenant. The plaintiff could not have replied the estoppel to the defendant's plea: *Fry v. Cook*, 2 Aik. 342. He must, therefore, be permitted to give it in evidence, and it must be conclusive upon the parties. If, however, this had been a case where the party might have replied the estoppel, it would have been his duty so to have done, if he intended to have relied upon the matter as an estoppel.

The judgment below is affirmed.

In *Wood v. Jackson*, 22 Am. Dec. 603, it was held, that where a former recovery was neglected to be pleaded as an estoppel, when there was an opportunity so to do, the jury might find according to the facts: See also *Smith v. Sherwood*, 10 Id. 143; *Towns v. Nims*, 20 Id. 578.

1. *Speaks v. Richards*.

2. *Treviuan v. Lawrence*.

3. *Howard v. Mitchell*.

4. *Gardner v. Buckbee*; S. C., 15 Am. Dec. 256.

5. *Wright v. Butler*; S. C., 21 Am. Dec. 323.

6. *Kühaffer v. Herr*; S. C., 17 Am. Dec. 658.

7. *Lord v. Bigelow*.

CASES
IN THE
COURT OF APPEALS
OF
VIRGINIA.

TUCKAHOE CANAL CO. v. TUCKAHOE RAILROAD CO.

[11 LEIGH, 42.]

GRANT OF PRIVILEGE TO CORPORATION IS NOT EXCLUSIVE, unless expressly said to be so by the charter; consequently the grant of a privilege to one company does not prevent the legislature from granting a like privilege to another, though the business of the former is injured or even ruined thereby.

PROPERTY OF CORPORATION IS SUBJECT TO RIGHT OF EMINENT DOMAIN as well as the property of private persons.

ACT SUFFICIENTLY PROVIDES FOR COMPENSATION, WHEN.—An act empowering a company to exercise the right of eminent domain, sufficiently provides for compensation when it refers to a general law as the law of the company; the general law prescribing the manner in which property shall be so taken.

CORPORATION EMPOWERED TO BUILD RAILROAD BETWEEN CERTAIN POINTS has a right to build a bridge over the canal of a company previously incorporated, as an exercise of the right of eminent domain.

CONDEMNATION NEED NOT PRECEDE EXECUTION OF THE WORK, and a corporation is not acting prematurely where it exercises a right of way before having the damages assessed; there is no absolute obligation on the corporation to institute process for assessing the damages, as in case of its default the owner may do so.

TUCKAHOE creek is a small tributary of James river, dividing the counties of Henrico and Goochland. The general assembly, by an act passed March 1, 1827, authorized certain persons to open subscriptions to build a canal from some point on the James river canal west of the creek, to some point on the creek in Goochland, near Crouch's coal-pits. Subsequent acts were passed; one of which, passed February 9, 1830, authorized a

change in the location, by which the company was authorized to extend the canal along the banks of the Tuckahoe to the upper locks, on lands of one John Wickham. Wickham had entered into an agreement by which he consented that the company should make its canal through his land and have the use of the waters of the Tuckahoe for supplying the same. The work was completed according to the provisions of the charter contained in the three acts of assembly. By an act passed March 27, 1837, the Tuckahoe and James river railroad company was incorporated, for the purpose of constructing a railroad from the land of one Martha Ellis, in Henrico, to such a point on the James river canal as the company should select. The company so projected its road as to cross the Tuckahoe canal in two places, by means of bridges. The canal company, in August, 1838, exhibited a bill in the circuit superior court of Goochland against the railroad company, claiming that the charter of the railroad company gave it no right to run its road across the canal, and that, upon general principles of law, it had no such right; that the canal company had a right to enjoy the profits of its work free from obstruction, and that the railroad company was an obstruction, and prayed an injunction to restrain the latter from erecting any bridge across the Tuckahoe canal. The injunction was awarded, but in March, 1839, it was dissolved, in so far as it restrained the railroad company from erecting a bridge for its road across the canal, at an elevation of six feet or more above the towing path of the canal. The canal company appealed.

Stanard, Lyons, and Leigh, for the appellants.

Taylor, and G. N. and C. Johnson, contra.

TUCKER, P. In the discussion of the respective rights of these parties, a very wide debate has been indulged, in the investigation of the legislative power, and the constitutionality of the charter granted by it to the railroad company, to the prejudice, as is alleged, of the Tuckahoe canal company, whose charter is of anterior date. Conceding, without question, the power of the judiciary to examine into and decide upon the constitutionality of laws, it can not be denied, that it is a power which ought not to be lightly exercised. The separation of the legislative and judicial powers, and the inhibition of the invasion by the one of the powers of the other, demands that we should be cautious lest we transcend our own limits, in the attempt to confine a co-ordinate branch within its legitimate boundaries. We must

carefully distinguish between legislative discretion and legislative power. With the former we have nothing to do, however harshly or injudiciously it may have been exercised. With us, this question is a question of power, not a question of the judicious exercise of it. With these views of our authority to pronounce upon the constitutionality of a law, I have considered the questions submitted in this case with an earnestness due to their importance.

The first appears to me to admit of no reasonable doubt. It has been contended that a charter having been granted to the canal company for the construction of a canal along a certain line, it is not within the constitutional power of the legislature to grant another charter for another improvement running side by side with the first, although in the first charter there is no express grant of exclusive right, and although the second improvement does not cross the line of the first. On the other hand, it is contended, that if the grant contained in the first charter be not exclusive, if the law which created it has not provided that no rival improvement shall be constructed by legislative authority, it is at all times competent to the legislature to grant new charters to rival companies upon the same line, even though the value of the first may be impaired or utterly annihilated thereby. In the latter opinion I concur. Such legislation may be, and indeed often is, unwise, unjust, and ruinous; but those are considerations which are in vain addressed to us, where the legislative body acts within the pale of its authority. That authority knows no limit but the charter of the government, and in that charter the only relevant provision is that no law shall be made impairing the obligation of contracts.

The question, then, resolves itself into this: Has the legislature contracted with the canal company that it shall have the exclusive transportation of the Tuckahoe valley, and that no rival company shall be incorporated which may impair its profits or take away its custom? That it has expressly done this can not be pretended. The act of incorporation contains no such provision. Is such a contract on the part of the government to be implied from the grant of the charter for the construction of the canal? I think not. It can never be conceded, that the incorporation of one company for internal improvement, is an implied negative of all future power in the legislature to incorporate other companies for other improvements. Such has never been the interpretation of legislative

grants in Virginia, but wherever exclusive rights are intended, express provisions are introduced for the purpose of tying up the hands of the legislature, and restricting the future exercise of legislative power. It never was dreamed, that the establishment of one bank was in itself a negative on the power to establish others. It never has been admitted, that making one railroad was a negative to all future power to construct another which might rival it; but where that was the design of the charter, it has ever been so expressed, as in the act of 1833, c. 3, sec. 38, the rights of the Richmond and Fredericksburg railroad company are expressly protected, for a limited time, against all rival charters. Were it otherwise, what difficulties would present themselves! Without express and definite provisions and limitations, how could we ascertain the extent of the exclusive right? Experience has proved, that monopoly is very ingenious in extending its rights and enlarging its pretensions. Give it the *carte blanche* of an implied contract, and we should soon find it without other limit than the limits of professional ingenuity; and the great mischief would at once present itself, of the improvement of the country being arrested by the perpetual objection of interference with chartered rights. Chartered companies are ever sensitive at the approach of a rival, and if the discovery of a possible clashing of interests shall be held sufficient to nullify a subsequent charter, it is impossible to foresee to what extent the legislative power may be crippled in this important branch of its duties. Already have we seen the passage of an act incorporating a railroad company from Norfolk to Weldon, most vehemently opposed by a former company, established between Petersburg and Roanoke. So the making a railroad from Richmond to Lynchburg was warmly opposed by the James river and Kanawha company. And here we see the Tuckahoe canal company insisting that their privileges are invaded by the chartering of the Tuckahoe and James river railroad company. If these pretensions are listened to, there will soon be an end of the necessary improvement of the country. But they are without foundation. Monopoly is not a matter of inference. It must rest its pretensions upon express grant. It is a restriction upon common right, and upon legislative power, and can not be implied.

What then is here insisted on? Is it a monopoly of the right to take tolls for the transportation on the canal? If this be all, we can not gainsay it. The canal is their own property; and property necessarily implies a right in the owner, to the exclu-

sion of all others. Is it a monopoly of the right to the transportation of the Tuckahoe valley? If so, the claim is not admitted. Upon the principles maintained by their own counsel, it is denied. What right, upon those principles, has the legislature to take from the colliers the liberty of transporting their coal by wagons, or in any other mode they may elect? What right to prevent their purchasing from the landowners the necessary ground, and constructing a railroad without a charter? So far as respected the canal company, the railroad company needed no charter to legalize their operations, if they did not cross the canal. It was only necessary to enable them to condemn the lands of others, and to sue and be sued. They do not derive their right to make such a road for transportation of coals from legislative grant. They would have had that without it, and it could never be affirmed, that a charter to them invaded the previous charter, since so far as the canal company are concerned, a charter would have given them nothing more than they had before, viz., a right to withdraw their coals from the canal transportation, and to transport them by land for themselves and others, according to their own pleasure and ability.

After the very able and comprehensive investigation of this subject in the case of *The Charles River Bridge v. The Warren Bridge*,¹ it would be superfluous as well as vain for me to attempt to enforce by any arguments of mine, the principles established by the majority of the court and sustained with such conspicuous ability by the counsel for the Warren bridge. It will suffice for me to refer to that case, and to express my assent to the proposition it establishes, that the incorporation of a company for the construction of a bridge or other improvement, where the public interest is concerned, is not to be construed as conferring exclusive privileges, where none such are expressly given by the charter; and, by consequence, that by charters of this description the legislature is not deprived of the power of granting other charters to other companies, even side by side with the former, and in the same line of travel, provided there is no express restriction upon their power in the first act of incorporation. Every principle of sound policy, indeed, forbids that this should be lightly done; or that it should be done without securing some indemnity to those who suffer under such legislation. But it is not matter of right in the company; it is matter of discretion in the legislature; and hence, it is very clearly no matter for judicial decision. The injury done is not

more direct than that which is in various instances occasioned by laws of unquestioned validity. The inns and villages upon every public road fall into dilapidation and ruin, upon the change of the course of travel by the construction of a railroad, and flourishing towns which have risen to wealth and importance on the faith of public law, by being made a port of entry, sink into insignificance upon the removal of their custom-houses to more favored spots. Yet who doubts the power, though many may doubt the wisdom of the legislature, in making ill-advised changes, which bring ruin upon the enterprising, and misery upon thousands? This sport with human prosperity and happiness, indeed, can not be too much reprobated; but its corrective is to be found elsewhere, and not here, unless the legislature transcend its power; and we have already seen, that unless exclusive rights are contracted for, the legislative power is without a trammel.

The case before us, however, is unlike any that has heretofore occurred in one very important particular. The Tuckahoe railroad company set up a pretension to run their road across the canal, on a bridge of a certain elevation. They are not content with passing on side by side with their rival, but they assert a right by their charter to cross his line of improvement. This brings us to the inquiry, how far the legislative power is adequate to the grant of a such a right? And here, I imagine, the right of eminent domain, which rides over every other, will be found sufficient for the purpose. It is well observed by my brother Brooke, in his lucid opinion in the case of *Stokes v. Upper Appomattox Company*, 3 Leigh, 337, on the subject of the *jus publicum*, that "though our institutions and laws are justly tenacious of private rights, yet the ruling principle of them is, that where private rights come in conflict with public, the former must yield to the latter; in which event, the legislature alone is competent to make compensation." It may, indeed, be truly said, that this *jus publicum*, this eminent domain, is the law of the existence of every sovereignty. It is as vital to it as air to animal life; and hence, it has no limit but the necessities of the body politic, of which that body alone must be the judge. It is absolute over the persons, as well as the property, of its members. It commands the sacrifice of life, as well as the surrender of possessions; and it would be strange, indeed, if to that sovereignty which can compel me to lay down my life in its service, the power should be denied of taking my property for its uses. At this time of day, it is too late to set up any barrier

to that power. It has been in constant exercise since the existence of society, and must continue unrestricted so long as society shall last. It has been exerted in the establishment of every common road through the country; in the erection of public buildings, the condemnation of land for public improvements, the impressment of property *flagrante bello*, and in various other modes not necessary to be here stated. In its exercise, however harsh, it never has been deemed to be a violation of individual right, or a breach of contract with the subject, either express or implied. For though the sovereignty has granted its land, or its privileges, without an express reservation of a right to take them for public uses, yet that right is necessarily implied; and even if alienable at all, it is not to be presumed to be surrendered without an express abandonment. As was observed by Chief Justice Marshall of the taxing power, "The whole community is interested in retaining it undiminished, and that community has a right to insist that its abandonment should not be presumed where the deliberate purpose to abandon does not appear."

It seems to be supposed, however, that the rights of the canal company, which are called a franchise, can not be invaded, though the power to take other private property for public uses may not be denied. It is proper, then, to come to a proper understanding of this word franchise, that we may the better comprehend what is to be regarded as trenching upon it. Now, I take a franchise to be: 1. An incorporeal hereditament; and, 2, a privilege or authority vested in certain persons by grant of the sovereign (with us, by special statute), to exercise powers, or to do and perform acts which without such grant they could not do or perform. Thus, it is a franchise to be a corporation, with power to sue and be sued, and to hold property as a corporate body. So it is a franchise to be empowered to build a bridge, or keep a ferry, over a public stream, with a right to demand tolls or ferriage; or to build a mill upon a public river, and receive tolls for grinding, etc. But the franchise consists in the incorporeal right; the property acquired is not the franchise. A bank has a right to purchase a banking house: when purchased, is the house a franchise? Surely not, for it is corporeal, whereas a franchise is incorporeal. So of a railroad company: it has the franchise to condemn land for its road, which at once becomes vested in the company in absolute property; but the land is not the franchise. It is real property held by the company upon the same implied terms on which others hold their lands, that it may be taken for public uses upon compensation

being made. Indeed, in former days, the eminent domain in the establishment of roads was exercised (as we are reminded by Judge Brooke, in the case before cited) without compensation; but it is now very wisely and justly provided by the constitution, that in all cases where private property is taken for public uses, just compensation shall be made to the owner for his loss.

It is not, then, perceived that the property of a corporation is less liable to the exercise of the *jus publicum*, than the property of a private individual. In both cases, the private right must yield to the necessities of the public, and in both the public must make compensation for the loss. In the former, indeed, the necessity is more apparent; for were it otherwise, the greatest mischiefs would ensue. The James river canal, running east and west, and the railroads running north and south, might very seriously impede the intercourse between the different parts of the state, if the companies have the right to prevent the passage across their line of improvement, and the *jus publicum* can not be exercised in the creation of new roads to meet the growing exigencies of the country. A person fifty yards from his mill, or county court-house, may be driven to the necessity of traveling miles around to reach them, or of submitting to the unreasonable exaction of a monopolist. It would be difficult to make him comprehend how the legislative power could extend to taking away his land to make the railroad, and could cut him off from his ordinary comforts and conveniences, and yet be inadequate to the exercise of the eminent domain in giving him a right of passage across the line of the improvement thus constructed to his detriment.

Upon the whole, therefore, I think it was competent to the legislature to empower the railroad company to cross the line of the canal, whether the canal company be regarded as the proprietors of the soil, or of a mere right of way. If they are proprietors of the soil, then they hold it by the same tenure that every man holds his land; that is, subject to the *jus publicum*. If it is a mere right of way to which they have title, the argument applies with yet more force, since the power to condemn the land itself is greater than that of condemning an easement upon it. In the exercise of this power, however, it must never be forgotten, that a just compensation for rights or property condemned must always be made.

But several questions here present themselves: 1. Is it necessary to the validity of the act, that compensation should be pro-

vided before the property can be taken? The constitution provides, that the legislature shall pass no law whereby private property shall be taken for public uses without just compensation. And although there is no express requisition that the act which invades the right shall provide the indemnity, yet, after much reflection, I incline to the opinion that it should do so. The instances which may occur *flagrante bello*, of impressments and destruction of property, though at first view they may seem to indicate a different construction, yet are rather to be referred to the necessities which war imposes, when the safety of the state is the supreme law, and justice is silenced by the din of arms.

2. Conceding, as I readily do, that the question of compensation is a judicial question, and that it is not in the power of the legislature to settle it, since this would be to unite judicial and legislative powers, and to enable the government to decide in its own case, it may next be asked whether an act invading private property will be held to be void, when it clearly appears to the judicial tribunal, that no injury is done, and nothing taken, which will entitle the party to compensation? To this I should answer in the negative; for however proper and prudent it might be to provide for the establishment of that fact by the ordinary proceedings, yet if, upon full investigation before the proper tribunal, no injury should appear, we should be justified, I think, in considering the statute as not in conflict with the spirit of the constitution.

In the present case, however, these questions are unimportant, if it shall appear that by the railroad charter a method is provided for ascertaining and making compensation for property necessary for the road. Now, this I think clear, by the reference in the charter itself, to the general railroad law, as the law of the company. According to that law, they are bound to proceed to condemn the lands necessary for their road. If the canal company are the owners of the soil where the road passes their line of improvement, the railroad company should have it condemned as their property; if they are not the owners of the soil, they should have proceeded to condemn the property as Mr. Wickham's property, or have purchased his rights by private contract; and in either case, they would hold subject to the easement of the canal, precisely as he held it. The record does not show how this matter is, nor is it material to the question we are considering; for the charter having duly provided for compensation, it is not void, although the company may have

failed to pursue its provisions. That is a matter to which I shall have occasion presently to refer.

We proceed next to inquire, whether the charter authorizes the railroad company to cross the line of the canal. This must be decided by reference to several acts: 1. The charter itself, which fixes one terminus of the road at Mrs. Ellis' land: the other terminus is declared to be such point on the James river canal as the railroad company may select. 2. It then vests in the company the liberty to construct their road subject to the provisions of the general railroad law. 3. By the provisions of that statute, the company have a right to enter upon all lands through which they may desire to conduct their road, and to lay out the same according to their pleasure. By this provision, then, they were invested with unlimited power to locate the road between the two termini as they pleased. If, then, the location so made crossed the canal, the law authorized them to cross it; and we have already seen that such authority was within the competence of the legislature to give. The only obligations upon the company are to avoid encroaching on dwelling-houses, etc., and to pay for the property taken.

We have, then, it is conceived, established these two points: that the railroad charter is not unconstitutional, and that it authorizes the company to cross the line of the canal. Upon what terms, is the next question to be solved. And here, there is some difficulty in ascertaining from the record what is the state of the fact. It does not appear whether any proceedings have been instituted by the company, or the proprietor, for the condemnation of the land and the assessment of damages. Certain it is, that the railroad company can not pass the canal, without being responsible to the owner of the land for the damages done by the condemnation. In what manner the canal company may be entitled to compensation for any injury they may sustain, and to what extent, it would be premature in this case to inquire. Satisfied as I am from the record, that they are not the owners of the soil, either legally or equitably, and that they have only title to an easement, I have no doubt that the land should be condemned as Mr. Wickham's. I am also of opinion, that when so condemned, the title to the land will vest in the railroad company, subject to the easement; and that they will be bound, as Mr. Wickham was bound, not to obstruct or impair its enjoyment. Whether it would be practicable for them, if they so desired, to extinguish that easement by any proceeding now known to the law, it is not necessary in the present state

of things to inquire. Our only concern is to know, whether they have undertaken to exercise their right of passing the canal prematurely. It seemed to be considered by the counsel, that the condemnation must precede the execution of the work. This is, I conceive, a misconception of the law. The company have a right to proceed with their work before condemnation; and, indeed, there is no absolute obligation on them, to institute the process for assessing the damages to the land, since in case of their default the owner himself may do so. It is, therefore, clear, that the work is not to be suspended until the damages are assessed and paid; and this is rendered more undeniable by the thirteenth section, which in connection with the previous sections provides, that "in the mean time" (that is, while the process of valuation or assessment is going on), "no injunction shall be awarded to stay the proceedings of the company in the prosecution of their works, unless," etc. It was not then necessary, that the damages should have been assessed and paid before the company proceeded to the erection of their bridges.

With these views of the law of this case, I can not perceive that the railroad company have, in any respect, "transcended the authority given by the law," in proceeding to erect their bridges over the line of the canal. Nor can I perceive, that they have done, or are about to do, any injury to the canal company which can not be adequately compensated in damages. On the contrary, it is palpable, that (apart from the competition, which we have already shown the canal company can not complain of) there is no injury done them whatever. The railroad bridges are much higher above the water than their own bridges. Every load which can pass the canal bridges will be wholly unobstructed by the railroad bridges, while boats that can pass the latter would be obstructed by the former. It is, therefore, not true that any injury whatever, and much less an irreparable injury, has been done, or is likely to ensue. The interference by injunction was, therefore, improvident, and in direct conflict with the statute, and with the established principles of a court of equity. I am, therefore, of opinion, wholly to dissolve it, and to dismiss the bill. It will be at its own peril if the railroad company so erects its bridges as to obstruct or impede the easement of the canal. It has not yet done so. When it does, it will be time enough to invoke the extraordinary powers of a court of equity, by showing the danger of actual and irreparable injury. It will then also be time enough to decide how far the

canal company have power to extend their easement, either laterally, or by raising their bridges, and removing as a nuisance that which is erected by the railroad company. Those inquiries, at this time, appear unnecessary and premature.

According to this opinion, the decree of the circuit superior court was right in dissolving the injunction, but erroneous in imposing the restriction as to the height of the bridges. It ought to have been wholly dissolved, as improvidently awarded.

The other judges concurred.

Decree, that the circuit superior court ought to have dissolved the injunction as improvidently awarded, without imposing any restriction as to the height of the bridges, and that the said order is erroneous.

Absent, PARKER and STANARD, JJ.

COMPENSATION FOR EXERCISE OF RIGHT OF EMINENT DOMAIN: See *Gardner v. Newburgh*, 7 Am. Dec. 526; *Ex parte Jennings*, 16 Id. 447; *Foreythe v. Ellis*, 20 Id. 218; *Attorney-general v. Stevens*, 22 Id. 526; *Beckman v. Saratoga R. R. Co.*, Id. 679; *Livingston v. Mayor of N. Y.*, Id. 622; *Boston & R. M. Corp. v. Newman*, 23 Id. 622; *Scudder v. Trenton Del. F. Co.*, Id. 756; *Cooper v. Williams*, 24 Id. 290; *Wellington's case*, 26 Id. 631; *Willyard v. Hamilton*, 30 Id. 196.

WHEELING INSURANCE CO. v. MORRISON.

[11 LEISH, 354.]

CONTRACT OF SALE, EFFECT OF ON RIGHT TO INSURANCE.—Where the insured enters into a contract to convey the premises, but before the contract is executed the premises are destroyed by fire, he retains such an interest that he can maintain an action on the policy.

CASE in circuit superior court of Ohio county, by Joseph Morrison against the president, etc., of the Wheeling Fire and Marine Insurance Company. Pleas, *non assumpsit* and payment. The following facts were agreed upon: In August, 1832, the defendants executed to Morrison a policy of insurance against fire on a certain dwelling-house of Morrison's; the policy contained, among other stipulations, a provision that it should be of no effect if assigned, unless the assignment was allowed by the company. In April, 1836, plaintiff entered into an agreement with one Peay, for the sale of the house insured and the lot on which it stood, by which it was agreed that Peay was to give Morrison the bond of one Clark, and, as additional security for the payment thereof, to give him a mortgage on two lots (on one

of which stood the building in question); upon the delivery of the bond and security a deed was to be made. It was agreed by parol between them, both before and after the written agreement, that the policy of insurance was to be transferred to Peay. The contract was not executed within the time stipulated, and shortly after the house was destroyed by fire. Subsequently the agreement was executed. If upon the facts stated the law was for the plaintiff, judgment to be rendered for him; if not, judgment to be for defendants. The circuit court decided for the plaintiff, and rendered judgment in his favor, to which, on the petition of the defendants, a *supersedeas* was allowed.

Johnson, for the plaintiffs in error.

Price, contra.

STANARD, J. In this case, certain facts have been agreed by the parties, and the law on those facts submitted to the court; the parties agreeing that if it be for the plaintiff, judgment shall be entered for a specified amount. The only question presented then is, has the plaintiff, on the facts agreed, a right of action against the defendants? the agreement of the parties as to the amount of damage precluding an inquiry by the court into that matter. The original insurance is free from all exception, and the property embraced by it having been destroyed by the risk insured against, the right to the action is clear, unless the interest of the insured in the property had been extinguished at the time of the loss. It is said to be extinguished by the executory contract of sale made before the loss. That contract, if it had been carried into full execution, according to its provisions, would have left the insured a mortgagee. The existence of that interest, of sufficient stability to sustain an original policy, is surely sufficient to repel the pretension that the interest was extinguished. If the contract executed would not extinguish the insurable interest, the contract executory surely would not. The interest so abiding in the insured would have entitled him to recover the full amount of the insurance on the loss, without subjecting him to a delay of his claim on the insurers, until he had shown, by the pursuit of the claim on the mortgagor, that it could not be recovered from him: *Stetson v. Massachusetts Fire Ins. Co.*, 4 Mass. 330 [3 Am. Dec. 217]. The mortgagee confessedly has an insurable interest, and yet it is nowhere intimated in any treatise or adjudication on the subject, that, in the event of destruction of the property, his claim on the policy must await the pursuit of his claim on the mortgagor.

A commission merchant, in the habit of making advances on consignment, has an insurable interest in the consigned property to the extent of his advances. Though I have not found a judicial decision on the precise point, yet in the case of *Parks v. General Interest Assurance Co.*, 5 Pick. 34, the immediate right to demand of the insurer the amount of advances on the property destroyed, without a previous pursuit of the claim on the consignors for the advances, was not questioned by the insurers. Where the hundred is responsible for the loss by fire, it would seem that the insured is entitled on the policy to the full amount, though he might recover full indemnity from the hundred.

But independent of the foregoing considerations, I think that on the facts agreed, the insured was entitled to recover the full insurance; those facts ascertaining that he was interested in the loss to that extent. There is no ground on which his claim is resisted, but that furnished by the ascription to the court of law, of power to look at the executory contract of sale in the manner a court of equity might, and to consider the interest in the property to have passed by the sale, if a court of equity would, at the instance of the insured, decree its specific performance. Without giving a judicial approbation to this proposition, but for this case conceding its correctness unquestionable, the inquiry is, on what terms would this contract be enforced at the instance of the vendor? To the solution of this question it is material to ascertain the effect of the parol agreement, stated in the agreed case to have been made before and after the execution of the written contract of sale for the transfer by the vendor to the vendee of the policy of insurance. No one can reasonably suppose that the contract to transfer the policy was separate from and independent of the contract of sale. In the nature of things it is not to be surmised that such a separate and independent contract could precede that for the sale of the property. We must understand that it constituted a part of the parol treaty for the sale, and formed one of the considerations of that parol agreement which must precede the reduction of it to writing—was omitted by accident or design in reducing it to writing—and was subsequently recognized. By it the vendor was to assure to the vendee the benefit of the insurance, and was bound to obtain the assent of the insurers to the assignment. This, in a court of equity, could have been set up by the vendee in resistance of the specific performance which would deny him the benefit of the insurance; and a court of equity would not

have compelled performance without an abatement for the loss. The assured was therefore interested at the time of the loss to the full amount; and in every view of the case I think the judgment ought to be affirmed.

TUCKER, P. Without impugning the doctrines of insurance as laid down in the cases cited for the plaintiffs in error, I am of opinion that the judgment in this case was right. In the formation of this opinion I have been mainly influenced by the agreed fact, that both before and after the contract between Peay and Morrison, there was a parol agreement that Morrison should transfer to Peay the policy of insurance. It is objected however that that agreement can not be admitted, either as a distinct, independent contract, or for the purpose of affecting the written contract. And this question is reserved. It must, I think, be decided against the plaintiffs in error.

By whom was the evidence of this parol contract introduced, and on whose behalf was it designed to operate? Was it introduced by the plaintiffs in error? If so, how is it competent for them now to deny the validity and effect of their own evidence? It is impossible; and it is accordingly intimated at the bar that it was introduced by and on the part of Morrison. Now Morrison was the party to be bound by it, and if he chooses to recognize it as a binding and valid agreement, notwithstanding it was by parol and not introduced into the body of the agreement, who can gainsay it? A parol contract is not void by the statute of frauds, though its obligation may be repelled by the party sought to be bound by it. The protection is introduced for his benefit by the statute, and may of course be renounced by him. If he is willing to abide by it; if, disdaining the *mala fides* of breaking his plighted faith, merely because the ceremonies of the law have been neglected, he recognizes the contract and confesses its obligation, shall it not be enforced? Let the unvarying course of equity cases answer the question. How then can it be objected by a third person, that the contract which the party himself acknowledges and claims to be valid and binding upon him, is not to be so considered? The pretension I conceive to be utterly without foundation.

I take the agreement, then, to assign the policy, as a substantive and most material part of this case, and I will now proceed to show how (taking that fact into consideration) Morrison, at the time of the fire, was damnified by the destruction of the premises. It can not be denied that according to the spirit of the agreement to assign the policy, Morrison was bound to give

to Peay the benefit of it when the house was burnt. By that occurrence, however, the policy became *functus officio*. An assignment after that would have been futile. But as, by the agreement, Peay was to have the benefit of the indemnity, so it is clear that he would have been entitled to demand from Morrison any benefit which he might derive from the insurance. Nay more, if Morrison had instituted his bill against Peay to enforce a specific execution of the contract of sale, a court of equity must have departed from its ordinary principle of holding the purchaser bound by the loss, and have refused a specific execution except upon the terms of making good that loss. It could not have compelled Peay to sustain a loss which, by the very contract itself, it was clear he did not engage to abide, but against which, in effect, he contracted to be insured. If therefore Morrison could have enforced the policy, the court would have obliged him to give the benefit of his recovery to Peay, or to relinquish the contract; or if, as is now contended, the policy was rendered nugatory by the sale, the court, in the exercise of its sound discretion, would not have deemed a specific execution reasonable, since Peay was not in equity bound to bear the loss against which he had in effect contracted to be insured. Morrison must then have lost his contract, or indemnified against the damage.

What then was the state of the case immediately upon the happening of the fire? Morrison then had the legal title in him. But it is said, that having sold, the title was to be considered to be in Peay upon equitable principles. This position has been advanced upon false deductions from the principle that equity considers that as done which ought to have been done. But equity never so considers, but in behalf of one who has done equity, and has put himself in a condition to demand the execution of his contract. Now, at the time of the fire, it did not appear whether the contract ever would be carried into complete effect. It did not appear whether Peay ever would or could comply, and therefore equity could not consider the title to be in him. He had not delivered the bond which was to have been delivered. That bond was to be the bond of a third person, and it might never have been in his power to deliver it. It was not delivered within the stipulated time. He then, on the fifth of May, 1836, was in default (for the bond had not even then been delivered), and on that day he had no right to demand a specific execution of the contract, and of course could not be deemed to have the

title. The title was then in Morrison; the house burned was his house, and the loss sustained was his loss. This is the more manifest when we reverse the picture. Morrison sues for a specific execution. Peay repels the demand unless he will pay for the house: alleging that by his contract he was to be protected against loss by fire; that Morrison either can or can not give him the benefit of the policy of insurance for which he contracted; that if he can, but will not, he has no title to relief; that if he can not, then he can not give what was most essential in the contract, and a court of equity will not relieve him. In the exercise of that discretion which is always exercised in bills for specific performance, it will not compel a party to execute the contract, when he can not get that which he contracted for. It would be unreasonable to compel him to take the property without the indemnity, when he expressly contracted for the indemnity: and equity will not do that which is unreasonable.

This defense would be unanswerable, and Morrison must either have kept the land, or paid for the loss. If he kept the land, he would be clearly entitled to recover of the insurers. If he paid the loss, he would be a loser and entitled to indemnity from them to the identical amount.

It has been contended, however, that as the contract was carried into execution subsequently, it appears that Morrison sustained no damage. I am by no means satisfied that the fullest proof of his having received the entire consideration without deduction for the loss, could take from him a right of action which had previously attached. But if proof of indemnity by that means could be a bar, then it must be clearly established, and the *onus* is on the defendants. The damage having been proved by the plaintiff, the indemnification must be shown by the defendants. But it is not shown; since, for aught that appears to the contrary, Morrison is liable to the action of Peay for not transferring the policy, or has indemnified him for the loss, which, upon every equitable principle, he was bound to do. Upon the whole, I think the judgment is right. The insurers have received their premium for a succession of years, and now seek to avoid the fulfillment of their contract upon the pretext that the insured has received indemnity from another quarter. Without calling in question the cases on insurance, we should not be too astute, I think, in the application of a principle by which a burden is to be taken from the shoulders of those who have been paid to bear it, and cast upon one of two

innocent persons who have advanced their money to be absolved from it.

By COURT. Judgment affirmed.

Absent, PARKER, J.

ALIENATION OF PROPERTY, EFFECT OF, ON CLAIM FOR INSURANCE.—For a discussion of this subject, see the note to *Lane v. Maine Mutual F. Ins. Co.*, 28 Am. Dec. 150; also *Atina Fire Ins. Co. v. Tyler*, 30 Id. 90.

KEVAN v. WALLER.

[11 LEIGH, 414.]

AUTHORITY CONFERRED ON TESTAMENTARY GUARDIANS IS JOINT AND SEVERAL; it is coupled with an interest; if one dies it will go to the survivor; and where one refuses, the other may qualify without him.

TO CONSTITUTE A GUARDIAN, EXPRESS WORDS OF APPOINTMENT ARE NOT NECESSARY; any words will do if the father's intent is apparent; but the language must be such as to imply a right to the custody, control, and protection of the ward.

LANGUAGE NOT A SUFFICIENT APPOINTMENT, WHEN.—Where a testator bequeathed his son a certain sum of money to be invested as his executors should think best, and also ordered "from the proceeds or dividends to educate him in the best manner under the direction of my said executors," this language is not sufficient to constitute his executors testamentary guardians.

In the will of John Myrick, late of Petersburg, there was the following provision: "I give and bequeath to my son John L. Myrick, the sum of fifteen thousand dollars, to be vested in bank stock or such other stock as my executors may think best and more profitable, and from the proceeds or dividends to educate him in the best manner under the direction of my said executors hereinafter named, and the surplus, if any, to be vested in like manner or stock." The legatee, J. L. Myrick, was an infant of tender years, and the hustings court of Petersburg appointed Andrew Kevan guardian; at the next term, on motion of Waller, one of the executors, who represented that he was appointed testamentary guardian by the will, and who demanded that letters testamentary issue to him, the court made a rule on Kevan to show cause why his appointment should not be revoked; both parties appeared, and the court revoked Kevan's appointment, but overruled Waller's motion to be permitted to qualify. Both parties appealed to the circuit superior court; Kevan did not prosecute his appeal, but he appeared and contested Waller's claim. The circuit superior court held that on account of the failure of

Kevan to prosecute his appeal, the propriety of the revocation of his letters was not examinable; also that the executors of Myrick were by his will appointed testamentary guardians, and reversed the sentence of the hustings court, which denied the issuance of letters testamentary to Waller. From this sentence, Kevan, by a petition to a judge of this court, prayed an appeal, which was allowed.

Macfarland, Rhodes, and Leigh, for the appellant.

Johnson and Taylor, contra.

TUCKER, P. The difficulty which was supposed to exist as to the jurisdiction in this case, disappears when we look to the position of the parties. Kevan, the appointed guardian of young Myrick, was summoned, at Waller's instance, to show cause why he should not be removed, he (Waller) claiming that he had been appointed testamentary guardian, and not having been summoned or notified according to law, to declare his acceptance or renunciation of the office. Kevan was removed by the hustings court of Petersburg by which he had been appointed. Waller then moved to be permitted to qualify: Kevan opposed this motion; and it was entered of record that he did so. The hustings court rejected Waller's motion; and Waller appealed. Now although, if the two cases are considered as distinct, Kevan's right of appeal might have created some doubt, if he had failed in the hustings court; yet as he succeeded, and Waller appealed, Kevan was properly before the circuit superior court as a party; and as that court reversed the sentence of the hustings court, and gave judgment against him for costs, there can be no doubt, I think, of his right of appeal from that judgment. The question is then fairly brought up as to the merits of the sentence. I put out of the case all question as to the power of one of two testamentary guardians to qualify without the other. I take it to be clearly and properly settled, under the statute concerning testamentary guardians, that the authority conferred is joint and several; that it is not a naked authority, but coupled with an interest; that if one dies, it will go to the survivor; that where one refuses, the other may qualify without him: that each is a complete guardian, if the other does not qualify. It would be most mischievous if, where there are several appointed, and some refuse to act, the rest should not be able to do anything; and yet this must be the consequence, if the appointment of several should be held to be one joint naked authority; a construction which would make the act of

little force, and the more guardians a father should appoint for the security of his child, the less secure he would be, since the refusal of one would defeat the authority of all: 2 P. Wms. 102, 107, 108.¹

The real question in the case is, whether the will of Myrick constituted Waller and Clarke the guardians of his child? And here I shall concede, that it has been decided (whether wisely or not, may perhaps be questionable) that the use of the term guardian, or other express words of appointment, is not necessary, nor is it material by what words the guardian is appointed, provided the father's intent be sufficiently apparent. Yet with this concession, I am still of opinion, that, as the father's authority is an innovation upon the common law, and in derogation of the rights of the mother or other kindred who would be entitled to be guardians by nature, the declaration of his intention should be distinct and unequivocal, and in terms inconsistent with the existence of the power and authority of the natural guardian. And if the language of his will is clearly reconcilable with the rights of such natural guardian, it should not be strained, by piling inference upon inference, so as to take them away. Thus, in the present case, the mother if alive, or the grandfather if she be dead, are the guardians by nature of this child. From the tie of blood, the law looks upon them as his natural protectors. But as the father may be presumed to know to whom it would be safest to intrust him, the law defers to his judgment: yet it surely will not be eager to presume that the father intended to tear his child from the tender cares of a mother, or other kindred, and to place his person, his fortunes, and his education, in the hands of a stranger. Before we arrive at such a conclusion, the language must be clear and cogent; and moreover, the direction given to the stranger must be incompatible with the guardianship in the next of kin, or it can not fairly be presumed to be designed to take it away. For if the intent can be fully satisfied short of annihilating the natural guardian's power, we are not authorized to go one step farther.

Such appears to me to be the present case. Here is a grandfather of the child yet living. Why should we presume, that the father intended to take from the grandfather, his natural friend and protector, this only child, and place his person and all his property, in the hands of Waller and the grandfather jointly? Because he has ordered, that he shall be "educated

1. *Byre v. Shaftsbury*.

in the best manner, under the direction of his executors?" Is this order incompatible with the rights of the natural guardian? What more was meant, than that Waller and Clarke should prescribe the course, and point out the mode, of his education to the person having the guardianship? Such directions that person would indeed be bound to follow; because, even before the statute, the father had the power of directing the course of his child's education, and a court of equity would enforce a compliance with his will. Since the statute, it is yet more clear; the greater power of appointing a guardian comprehending that of directing the education, or giving power to direct it. Accordingly, in the case of *Beaufort v. Berty*,¹ where the testator appointed two guardians, and recommended that they should take the advice of the duke of Ormond as to the education of the wards, Lord Macclesfield recognized the validity of this recommendation, but the duke of Ormond being attainted, the authority was held to devolve upon the great seal, and the chancellor thereupon directed that the guardians should take the advice and follow the counsel of the duke and duchess of Grafton, who were relations of the wards. Here, then, the guardianship was in two persons and the "direction of the education" in two others. And is anything more common, than for a father who is solicitous about his child's education, to declare his wishes that some friend, in whom he has confidence, should have the direction of his education, without designing to burden him with the guardianship, the custody of his person, and the management of his fortunes? Such a construction would defeat its very object; for a friend might be very willing to discharge the duty of an adviser or director of the child's education, who would be unwilling or unable to take upon himself the guardianship. That great and excellent man, our former fellow-laborer, and one of the lights and ornaments of this court (the late Judge Carr), recommended that his son should be educated under the direction of myself in conjunction with his wife. It may be safely affirmed, that he never designed to take the guardianship of his boy from that excellent lady, or to vest in me any power over his person or his estate. Certain it is, I never dreamed of such a construction of his will, whilst I should have faithfully complied, as far as I was able, with his wishes. I should never have supposed it necessary to enter into bond with security before I could have recommended a course of study or instruction, nor should I have thought myself entitled to qualify as guardian,

and take the child and his estate from his mother's hands, in case she did not qualify also. I have mentioned this case, merely as furnishing an actual instance of a provision similar to that at bar, in which the construction contended for by the appellee, would obviously have violated the wishes of the testator.

From what has been said, I think it clear, that an authority to direct the education of a child, may be exercised by one, while the guardianship (that is, the custody of his person and property) may be in another. The two things, then, are not incompatible, and if not incompatible, the gift of the former is no derogation of the latter. To me, indeed, it appears, that the very provision, that a child shall be educated under the direction of an individual, implies the custody by one person and the direction of the education by another. Had the testator, in this case, designed to confer the guardianship, he would have conferred it *totidem verbis*, since it would have been the most natural and obvious mode of expressing himself; or had he designed, that his child's education should be directly conducted by the executors, he would have said, that he should be educated by them; but in declaring that he should be educated under their direction, there is the strongest implication of agency in some other who was to be subject to their direction. That other was the guardian. The clause in question is indeed imperfect: he gives his son fifteen thousand dollars, "and from the proceeds to educate him." Here is something wanting, something to be supplied; but what is not so clear. Yet it is clear, that the words "my executors," are not the omitted words; for if they are inserted, it will make the sentence absurd. It will make the testator provide that his executors shall educate him, under the direction of his executors. Either the testator intended some other person, or he intended to speak impersonally; and, in either case, he seems to have looked to his child's education being conducted by others, though under the direction of the executors.

The statute concerning guardians, etc., and the interpretation of the word tuition there used, were the subject of much discussion at the bar. That word I certainly do not understand in the narrow sense of instruction or education; it is used in the broader sense of protection, superintendence, guardianship; it comes from the latin *tueor*, to defend; and hence its radical signification is defense. This is also implied by the word guardianship; which, however, is yet broader, for it implies custody; its root is the anglo-saxon *wardian*; which signifies to look, to

look after, and thence by transition, to guard, to keep; and so implies custody. The word guardian is derived immediately from the French *gardien*, which itself comes from *wardian*; the *w* being converted, as is usual, into *g*: Richardson's Dict.; 1 Tooke's Diversions of Purley, 332-334; 2 Inst. 305. Thus, guardianship includes the idea of custody; and custody and tuition, as used in the statute, constitute guardianship.

Admitting, therefore, that no particular words are necessary in a will for the appointment of a testamentary guardian, it may safely be affirmed, that the language must be such as to imply a right to the custody, control, and protection of the ward. This I do not think can be fairly implied from the provision, that the child shall be educated under the direction of the executors. The word education, here, is obviously used in the narrow sense of instruction, and does not imply tuition, and much less custody. But it is contended, that we must infer a right of control over the education, from the right of direction; a right to the possession of the person from such right of control; and the powers of a guardian over the estate from the right to the possession of the person; and thus, from the simple power to direct the course of education or instruction, the appellee claims to be invested with the custody of person and estate, and a guardian's power over both. I can not consent thus to build inference upon inference, of which I am persuaded the testator never dreamed. I must have somewhat more than a single case, and that too of doubtful authority and analogy, before I will pile consequence upon consequence, for the purpose of vesting in a party the largest powers over the person and estate of an orphan from so remote an implication.

If indeed we look to authority, I think the case of the appellee will not be much better than without it. The case of lady *Teynham v. Lennard*¹ stands alone, and may well be suspected to have been partly decided under the influence of religious jealousy and intolerance. It occurred in the very heat of sectarian controversy, early in the reign of George I., and turned on the dangers of intrusting the education of a child to a papist mother. It was, moreover, stronger than this case; for there were in that case words of exclusion of the natural guardian: the testator said, he "expected his father to take care of the education of his child in the protestant religion, and not leave the education of it to his wife." Against this case may fairly be opposed the case stated in *Bedell v. Constable*,² where even a devise of land

1. 4 Bro. P. C. 302.

2. Vaugh. 177.

to J. S. during the minority of the testator's child, for his maintenance and education, was held not to constitute him guardian. This view of the case renders it unnecessary to inquire whether the evidence adduced to show Waller's unfitness for the office, would have justified the refusal to permit him to qualify, even if he had been really appointed a testamentary guardian.

Upon the whole, I am of opinion, that the sentence of the circuit superior court be reversed with costs, and the sentence of the hustings court refusing Waller permission to qualify as guardian, affirmed.

The other judges concurred. Sentence reversed.

Absent, STANARD, J.

TESTAMENTARY GUARDIANS, APPOINTMENT AND POWERS OF: See *Matter of Van Houten*, 29 Am. Dec. 707, and note 712, where this subject is discussed at length.

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

STATE v. MARLER.

[2 ALABAMA, 43.]

WITNESSES CAN NOT BE IMPEACHED by proving that he made different statements to other persons, until after he has been asked whether or not, at a time and place named, he made such contradictory statements to them. INSANITY MUST BE SHOWN BY CLEAR AND CONVINCING PROOF to the satisfaction of the jury, where it is set up as a defense in a criminal prosecution; but if the jury entertain a reasonable doubt of the defendant's sanity, they should acquit him.

ERROR to the circuit court of Montgomery. The defendant was indicted, tried, and found guilty of murder, and the presiding judge referred to this court for revision, the several points of law arising out of the charges given by him, as novel and difficult. The other facts appear from the opinions.

Goldthwaite, for the defendant.

Lindsay, attorney-general, *contra*.

ORMOND, J. Questions arising on the law of evidence, from the universality of their application, are always questions of great interest. The rule to be expounded in this case, has a double object—it is not only adopted as a means of arriving at truth, but is also designed for the protection of witnesses. The credit of any witness might be destroyed, if it were permitted, after his examination, to call other persons to contradict his testimony in court, by proving that he had made different statements to them, without first inquiring of him whether he had made such statements to them, as he might thereby recollect

the circumstances attending the supposed conversation, if real, and perhaps be able to explain it. In this case, the ground was laid on the cross-examination of one of the state's witnesses, by asking him, if he had not made different statements to two persons, who were named, or to any other person. The two persons to whom his attention had been directed, were examined, and contradicted him. The prisoner's counsel then proposed to call another, to prove that the witness had the same conversation with him. The counsel for the prisoner now insists, that he should have been received on the ground that it was a question of veracity between the state's witness, and those who contradicted him, and that they had a right to support their witnesses. We do not consider that the reasons assigned, furnish any cause for departing from the rule above laid down. Until the witness for the state had been inquired of as to the last witness offered, it can not be known that he would have denied having had the conversation with him he is prepared to testify to; he might admit and explain it, so as to make it harmonize with his testimony. As to fortifying their witnesses, who had contradicted the witness for the state, it is obvious that, by the contradiction which their testimony afforded, the object had already been accomplished. Whether it might not have been proper to admit such testimony, if the credit of the prisoner's witness had been assailed by proof, it is not necessary now to determine. As to the refusal of the court to permit the witness for the state to be called back, for the purpose of laying the ground for the examination of Armstrong, we think it purely a matter of discretion, which can not be reviewed in this court. It might operate most mischievously, to permit the credit of witnesses to be thus impeached, after they had left the stand, and their evidence fully known; and of this, no one can judge so well as the court, in whose view the whole transaction passes.

The remaining question is one of much greater magnitude, and of some difficulty. In civil cases, where there is conflicting testimony as to the existence of any fact necessary to be established by either party, the jury are under the necessity of weighing the evidence, and of deciding in favor of that party on whose side the evidence predominates. But in criminal cases, the humanity of our law requires, that the guilt of the accused should be fully proved. It is not sufficient that the weight of evidence points to his guilt. The jury must be satisfied beyond a reasonable doubt of his guilt, or he must be acquitted. It is not meant here, that the evidence on which to found a verdict

in a criminal case, should be so conclusive as to exclude the presumption, that notwithstanding the evidence, the accused might be innocent, but only that it should be of a character to raise that high degree of probability, on which all human action depends.

In what respect then does the question of insanity, when set up as an excuse for an act which would otherwise be a crime, differ from any other fact, which a jury may be called on to decide in a criminal case? As insanity excuses the commission of crime, on the ground that the actor is not an accountable being, it is obvious that society has a deep interest in providing the means of preventing its being assumed as a cover for the commission of crime, and as this is more easily simulated, and depends more on the volition of the actor himself, than any other defense, which would excuse the commission of an act otherwise criminal, the interest of the public demands that it should be established by more conclusive proof. Thus, in *Arnold's case*,¹ who was indicted for shooting at Lord Onalow, and who set up the plea of insanity, Tracy, justice, observed, that the defense of insanity must be clearly made out; that it is not every idle and frantic humor of a man, or something unaccountable in his actions, which will show him to be such a madman as to exempt him from punishment; but that where a man is totally deprived of his understanding and memory, and does not know what he is doing, any more than an infant, a brute, or a wild beast, he will be properly exempted from punishment. In *Bellingham's case*, who was indicted for the murder of Mr. Percival, Mansfield, C. J., in reference to the plea of insanity, relied on for the prisoner, said, "that in order to support such a defense, it ought to be proved by the most distinct and unquestionable evidence, that the prisoner was incapable of judging between right and wrong; that in fact, it must be proved beyond all doubt, that at the time he committed the act, he did not consider that murder was a crime against the laws of God and nature, and that there was no other proof of insanity, which would excuse murder or any other crime."

These opinions, which are undoubted law, show the stringent nature of the evidence by which insanity must be proved to be an excuse for crime; but we do not understand that even this defense must be established by evidence so conclusive in its nature, as to exclude every other hypothesis. This would be requiring something akin to mathematical proof, of which the sub-

1. 16 How. St. Tr. 695.

ject is clearly not susceptible; but that the jury must be fully satisfied that the evidence is made out, beyond the reasonable doubt of a well-ordered mind. To test the case at bar by these principles, the court was moved to charge the jury, "that if they entertained any reasonable doubt as to the sanity of the prisoner, they must acquit him;" which charge the court refused. Upon the principles here laid down, it was error to refuse this charge. If the prisoner was insane, he was not an accountable being; and can the public justice of the country repose with safety upon a verdict found by a jury, every member of which may have entertained a reasonable doubt of its propriety? It would have been highly proper, that the court, when called on thus to charge, should have explained to the jury, that this defense required to be made out by strong, clear, and convincing proof, and guided by these considerations, if they still entertain a reasonable doubt of the sanity of the prisoner, it was their duty to acquit.

The charge which was given by the court, does not appear to be objectionable; but as it is probable the jury were misled by the refusal to give the charge asked for, the judgment must be reversed, the cause remanded, and the prisoner directed to remain in custody to await a trial *de novo*; unless in the interim he shall be discharged by due course of law.

COLLIER, C. J. I concur in the reversal of the judgment of the circuit court, but as I do not entirely assent to the opinion of my brother Ormond, I deem it proper briefly to declare my views upon the only point of difference between us. The charge, as prayed in regard to the prisoner's insanity, should in my judgment have been refused. It supposed that the jury would be bound to acquit, if they entertained a reasonable doubt as to the prisoner's sanity. The law requires insanity, when alleged as an excuse for the commission of an offense, to be made out by proof, as full and satisfactory as is required to establish the existence of any other fact. A reasonable doubt, whether the accused was sane, would not authorize his acquittal—there must be a preponderance of proof to show insanity to warrant a verdict of not guilty for that cause.

But in my apprehension, the error consists in the charge given to the jury. They are informed, that if they entertain a reasonable doubt as to the prisoner's insanity, it would be their duty to regard him as sane, and if the facts established a case of murder, they should find him guilty. Now, it was entirely possible for the jury to have entertained a reasonable doubt of his in-

sanity, although the weight of evidence was so strong, as to have led their minds to the conclusion, that such was the prisoner's condition. This charge, then, must have induced the jury to believe, that the proof of insanity should have been conclusive and irresistible. In this point of view they may have been misled, or have required proof too stringent. Hence, I am in favor of reversing the judgment.

INSANITY AS A DEFENSE ON AN INDICTMENT FOR CRIME.—It was always a settled rule of the common law that a person could not be legally punished for any act committed by him while he was insane. We can hardly doubt that, in times past, juries have convicted and courts have pronounced judgment upon men whom we, even with the imperfect light still possessed by us, should unequivocally pronounce to have been insane at the time they committed the acts for which they suffered punishment. But if the law has punished persons who were undoubtedly fitter subjects for the insane asylum than for the penitentiary or the gallows, it is due, not to any lack of humanity in the spirit of the law, but rather to the prevailing ignorance of what constituted insanity, or to the application of wrong tests of responsibility. The common law never intended to inflict punishment upon one whom it believed to be insane at the time when he did the act charged as a crime. For the law holds that a criminal intent is an essential element in every crime, and if by reason of insanity a person be incapable of forming any intent, he can not be regarded by the law as guilty.

TEST OF RESPONSIBILITY.—It has been very generally assumed that there exists some test by the application of which to the facts of a particular case, a jury may determine whether or not a person was sane enough to be legally responsible for the act with which he stands charged. The first test of this kind is that proposed by Lord Hale, in his Pleas of the Crown. He says: "It is very difficult to define the indivisible line that divides perfect and partial insanity; but it must rest upon circumstances duly to be weighed and considered both by the judge and jury, lest on the one side there be a kind of inhumanity towards the defects of human nature, or on the other side too great an indulgence given to great crimes; the best measure that I can think of is this: such a person as laboring under melancholy distempers, hath yet ordinarily as great understanding as ordinarily a child of fourteen years hath, is such a person as may be guilty of treason or felony:" 1 Hale's P. C. 30. This test can hardly be regarded as very definite or correct. Yet such has been the eagerness to find some test or rule by which the responsibility of a prisoner charged with the commission of a crime may be measured, that this test has been very widely accepted and followed in later cases. And a writer on this subject in the American Law Review for November, 1881, referring to this test, says: "Doubtless the test of 'a child of fourteen years' is vague; but if we take the modern formula and say that the accused may be found guilty if he could appreciate the nature and quality of his act, and knew that it was wrong, we are probably following the rule that Lord Hale meant to lay down." And if we consider the great advances that have been made in scientific investigations since Lord Hale's time, and the very slight improvement of the tests proposed by later writers and judges, we shall wonder not that he was satisfied with so vague and indefinite a test of responsibility, but that he succeeded in finding one so good. We can not regard the test proposed by Mr. Justice Tracy, in his charge to the jury on the trial of

Arnold, in 1724, as any improvement on that of Lord Hale. He said: "It is not every kind of frantic humor or something unaccountable in a man's actions, that points him out to be such a madman as is to be exempted from punishment: it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast; such a one is never the object of punishment:" 16 How. St. Tr. 764. Under this charge the defendant was found guilty and was sentenced to be hanged, but on the intercession of Lord Onslow, the person whom the prisoner had attempted to assassinate, his punishment was commuted to imprisonment for life. The evidence in the case tended very strongly to show the insanity of the accused. But it is evident from the charge above given that the court regarded no one as exempted from the penal consequences of crime except one whose reason was completely dethroned. If the accused retained the slightest vestige of rationality, he must be held responsible for his acts. It seems to us that in so palpable a case no test would be needed.

Lord Erskine, in his celebrated speech in defense of Hadfield, who was tried in 1800 for high treason for shooting at King George III., in Drury Lane theater, referring to the doctrines of Lord Hale and Justice Tracy, says: "The attorney-general, standing undoubtedly upon the most revered authorities of the law, has laid it down, that to protect a man from criminal responsibility, there must be a total deprivation of memory and understanding. I admit, that this is the very expression used both by Lord Coke and by Lord Hale; but the true interpretation of it deserves the utmost attention and consideration of the court. If a total deprivation of memory was intended by these great lawyers to be taken in the literal sense of the words—if it was meant, that, to protect a man from punishment, he must be in such a state of prostrated intellect, as not to know his name, nor his condition, nor his relation towards others—that if a husband, he should not know he was married; or, if a father, could not remember that he had children; nor know the road to his house, nor his property in it—then no such madness ever existed in the world. It is idiocy alone which places a man in this helpless condition:" 27 How. St. Tr. 1312. In this case it was quite certain that Hadfield was not wholly deprived of memory and understanding. He evidently knew right from wrong, and realized clearly what would be the legal consequences of the act he was about to commit; in fact, it was through these consequences that his object was to be attained. But he was evidently laboring under an insane delusion which the court, no doubt largely influenced by the able arguments and great eloquence of Erskine, held to have rendered him irresponsible for the act which he committed. The following is the test of responsibility advanced by Lord Erskine in this case: "Delusion, therefore, where there is no frenzy or raving madness, is the true character of insanity; and where it can not be predicated of a man standing for life or death for a crime, he ought not, in my opinion, to be acquitted; and if courts of law were to be governed by any other principle, every departure from sober, rational conduct, would be emancipation from criminal justice. I shall place my claim to your verdict upon no such dangerous foundation. I must convince you, not only that the unhappy prisoner was a lunatic, within my own definition of lunacy, but that the act in question was the immediate, unqualified offspring of the disease. * * * I can not allow the protection of insanity to a man who only exhibits violent passions and malignant resentments, acting upon real circumstances:" *Id.* 1314. Here we have a test which, whether correct or not, can at least be applied in cases where difficulties do really arise. For, as Erskine truly remarked, the cases to which the tests given by Lord

Hale and Justice Tracy could be applied, "are not only extremely rare, but never can become the subjects of judicial difficulty. There can be but one judgment concerning them." The eloquence and ability of Lord Erskine secured the acquittal of Hadfield. But the delusion test, here proposed by him, does not seem to have received the subsequent sanction of the courts.

In the case of Bellingham, who was tried at the Old Bailey, in the year 1812, for the murder of Mr. Percival, Lord Chief Justice Mansfield, in charging the jury, is reported to have said: "In another part of the prisoner's defense, which was not, however, urged by himself, it was attempted to be proved that, at the time of the commission of the crime, he was insane. With respect to this the law was extremely clear. If a man were deprived of all power of reasoning, so as not to be able to distinguish whether it was right or wrong to commit the most wicked transaction, he could not certainly do an act against the law. Such a man, so destitute of all power of judgment, could have no intention at all. In order to support this defense, however, it ought to be proved by the most distinct and unquestionable evidence, that the criminal was incapable of judging between right and wrong. It must, in fact, be proved beyond all doubt, that at the time he committed the atrocious act with which he stood charged, he did not consider that murder was a crime against the laws of God and nature. There was no other proof of insanity which would excuse murder or any other crime:" 1 Coll. Lun. 671. And further on: "The single question was whether, when he committed the offense charged upon him, he had sufficient understanding to distinguish good from evil, right from wrong, and that murder was a crime not only against the law of God, but against the law of his country:" Id. 673.

On the trial of Bowler at the Old Bailey in 1812, Sir Simon Le Blanc, who presided, stated to the jury that it was for them to consider whether, at the time the defendant committed the act, he was in a state of mind to distinguish right from wrong, or under the influence of any illusion towards the particular object which rendered him for the moment insensible to the nature of the act he was about to commit; for if he was so influenced, he could not be deemed responsible to the law; otherwise, it would be their duty to find him guilty." 54 An. Reg. 309; 1 Coll. Lun. 673; Shelf. Lun. 461. In each of the cases last cited the accused was convicted and executed, although it was clear from the evidence that he was laboring under a delusion at the time of the commission of the crime alleged.

In the case of *Rex v. Offord*, 5 Car. & P. 168, tried in 1831, in summing up, Lord Lyndhurst, C. B., told the jury "that they must be satisfied before they could acquit the prisoner on the ground of insanity, that he did not know when he committed the act what the effect of it, if fatal, would be with reference to the crime of murder. The question was, did he know that he was committing an offense against the laws of God and nature." The reporter goes on to say that his lordship referred to the doctrine laid down by Sir James Mansfield in *Bellingham's case* and expressed his complete satisfaction therewith. It appears to us that Lord Lyndhurst's test, that the prisoner should have been capable of knowing that the crime he was about to commit would be murder, in order to render him liable to punishment, is a much less rigorous test than that propounded by Lord Mansfield in the case of *Bellingham*. And so it seems the jury regarded it, for they found the prisoner not guilty, on the ground of insanity, although the evidence of insanity does not appear to have been any clearer than it was in *Bellingham's case*. In the case of *Regina v. Oxford*, 9 Car. & P. 525, tried in 1840, Lord Denman, C. J., in charging the jury, said: "The question is, whether the prisoner was laboring under that species of insanity which satisfies you that

he was quite unaware of the nature, character, and consequences of the act he was committing, or, in other words, whether he was under the influence of a diseased mind, and was really unconscious at the time he was committing the act, that it was a crime." The rule here laid down is called the right and wrong test, and is the rule still followed in England. The jury, under this charge, acquitted the prisoner, on the ground of insanity.

In the year 1843, McNaghten was tried for the murder of Mr. Drummond. The defense set up was insanity, and the medical evidence offered by the prisoner in support of his plea was: That persons of otherwise sound mind might be affected by morbid delusions; that the prisoner was in that condition; that a person so laboring under a morbid delusion, might have a moral perception of right and wrong, but that in the case of the prisoner it was a delusion, which carried him away beyond the power of his own control, and left him no such perception; and that he was not capable of exercising any control over acts which had connection with his delusion. The following is the charge of Lord Chief Justice Tindal in this case: "The question to be determined is, whether, at the time the act in question was committed, the prisoner had or had not the use of his understanding, so as to know that he was doing a wrong or wicked act. If the jurors should be of opinion that the prisoner was not sensible, at the time he committed it, that he was violating the laws both of God and man, then he would be entitled to a verdict in his favor; but if, on the contrary, they were of opinion that when he committed the act he was in a sound state of mind, then their verdict must be against him." The jury returned a verdict of not guilty, on the ground of insanity. The result of the trial caused a deep feeling of dissatisfaction in the public mind, and the subject was twice discussed in the house of lords: See 67 Hans. Parl. Deb. 288, 714. The house of lords propounded to the judges the following questions in relation to the subject under discussion: 1. What is the law respecting alleged crimes committed by persons afflicted with insane delusion, in respect of one or more particular subjects or persons: as, for instance, where at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit? 2. What are the proper questions to be submitted to the jury, when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defense? 3. In what terms ought the question to be left to the jury, as to the prisoner's state of mind at the time when the act was committed? 4. If a person under an insane delusion as to existing facts, commits an offense in consequence thereof, is he thereby excused? 5. Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious, at the time of doing the act, that he was acting contrary to law, or whether he was laboring under any and what delusion at the time?

Mr. Justice Maule answered separately. Lord Chief Justice Tindal, speaking for all the other judges, replied as follows: 1. In answer to the first question, assuming the inquiry to be confined to those persons who labor under such partial delusions only, and are not in other respects insane, they were "of opinion that, notwithstanding the party accused did the act complained

of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law;" by which expression they understood the lords to mean "the law of the land." 2 and 3. In answer to the second and third questions, which, they thought, could be more conveniently answered together, they replied, "that the jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it; that he did not know he was doing what was wrong." They stated that the mode of putting the latter part of the question to the jury had generally been, whether the accused, at the time of doing the act, knew the difference between right and wrong. This mode they conceived not to be "so accurate when put generally and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable." 4. In answer to the fourth question they said: "The answer must of course depend on the nature of the delusion: but, making the same assumption as we did before, namely, that he labors under such partial delusion only and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defense, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment." 5. In answer to the fifth question, they said: "We think the medical man, under the circumstances supposed, can not in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same can not be insisted on as a matter of right." See *McNaghten's case*, 10 Cl. & Fin. 200. The law as laid down in the foregoing answers has been implicitly followed in England ever since, and has also been approved by the courts of many of the states in this country. The various tests, then, so far considered, are: 1. The test of "a child of fourteen years." 2. What has been termed "the wild-beast test." 3. The test of right and wrong in the abstract. 4. The test of right and wrong with reference to the particular act. Since the answers of the twelve judges above

mentioned were given, the English courts have rested satisfied with the last-mentioned test. In this country, however, the rule has not met with universal acceptance. In most of the states the capacity of the accused to distinguish right from wrong in respect to the act charged as a crime is made the test of his responsibility: *Boswell v. State*, 63 Ala. 307; S. C., 35 Am. Rep. 20; *People v. McDonell*, 47 Cal. 134; *People v. Coffman*, 24 Id. 230; *State v. Spencer*, 1 Zab. 196; *State v. Wilner*, 40 Wis. 304; *State v. King*, 64 Mo. 591; *Dove v. State*, 3 Heisk. 348; *Thomas v. State*, 40 Tex. 60; *Wright v. People*, 4 Neb. 407; *Flanagan v. People*, 52 N. Y. 467; S. C., 11 Am. Rep. 731; *Willis v. People*, 32 Id. 715; *Brinkley v. State*, 58 Ga. 296; *State v. Lawrence*, 57 Mo. 574; *Williams v. State*, 7 Tex. App. 163; *Bovard v. State*, 30 Miss. 600; *State v. Pratt*, 1 Houst. Cr. 249; *State v. Burns*, 25 La. Ann. 302. The same rule is adopted in the United States courts: *United States v. McGlue*, 1 Curt. C. C. 1; *United States v. Shultz*, 6 McLean, 121; *United States v. Holmes*, 1 Cliff. 98; *Guiteau's case*, 10 Fed. Rep. 161. In several of these cases the language used by the court is so vague and loose, that it would justify one in concluding that the test of responsibility meant to be applied was, the capacity of the accused to distinguish right from wrong in the abstract. It is difficult, however, apart from a knowledge of all the facts and circumstances surrounding the particular case, to clearly comprehend the exact nature and meaning of the charge. And it is believed that in no court in this country, at the present day, would a charge be considered law, that gave as a test of responsibility the capacity or ability of the accused to distinguish right from wrong, in the abstract, at the time when he committed the act for which he stands charged.

But, on the other hand, the courts of a considerable number of states have shown by their decisions that they have not been entirely satisfied with the answer of the English judges. They do not regard the ability of a person to merely know right from wrong to be a sufficient test of his responsibility in all cases. They believe that to hold him responsible for his act he must have possessed, at the time, mental power sufficient to apply that knowledge to his own case, and to know that, if he does the act, he will do wrong and receive punishment; and that, if the mind of the accused was so far impaired by mental disease, that for the time being the disease overwhelmed his reason, conscience, and judgment, and caused him to act from an irresistible and uncontrollable impulse, he can not be held legally responsible for the act so committed: *Commonwealth v. Rogers*, 7 Metc. (Mass.) 500; *Commonwealth v. Mosler*, 4 Pa. St. 264; *Ortwein v. Commonwealth*, 76 Id. 414; S. C., 18 Am. Rep. 420; *Brown v. Commonwealth*, 78 Id. 122; *Sayres v. Commonwealth*, 88 Id. 291; *State v. Feller*, 25 Iowa, 67; *Smith v. Commonwealth*, 1 Duv. 224; *Kriel v. Commonwealth*, 5 Bush, 362; *State v. Gut*, 13 Minn. 341; *State v. Shippey*, 10 Id. 223; *State v. Johnson*, 40 Conn. 136; *Andersen v. State*, 43 Id. 514; S. C., 21 Am. Rep. 669; *People v. Klein*, Edmonds' Sel. Cas. 13; *Blackburn v. State*, 23 Ohio St. 146. Gibson, C. J., in charging the jury in *Commonwealth v. Mosler*, 4 Pa. St. 267, said: "But there is a moral or homicidal insanity, consisting of an irresistible inclination to kill, or to commit some other particular offense. There may be an unseen ligament pressing on the mind, drawing it to consequences which it sees, but can not avoid, and placing it under a coercion, which, while its results are clearly perceived, is incapable of resistance. The doctrine which acknowledges this mania is dangerous in its relations, and can be recognized only in the clearest cases. It ought to be shown to have been habitual, or at least to have evinced itself in more than a single instance." In *Blackburn v. State*, 23 Ohio St. 165, the form of question to be submitted to the jury, which was approved by the court, is: "Was the accused a free agent in forming the pur-

pose to kill? Was he at the time capable of judging whether that act was right or wrong? And did he know at the time that it was an offense against the laws of God and man?" The form of instruction approved in *Smith v. Commonwealth*, 1 Duv. 232, is: "The true test of responsibility is, whether the accused had sufficient reason to know right from wrong, and whether or not he had sufficient power of control to govern his actions." The charge approved in *State v. Gut*, 13 Minn. 358, is as follows: "That the defendant is not entitled to an acquittal on the ground of insanity, if at the time of the alleged offense he had capacity sufficient to enable him to distinguish between right and wrong as to the particular acts charged, and understood the nature and consequences of his acts, and had mental power sufficient to apply that knowledge to his own case." And Dillon, C. J., delivering the opinion of the court in the case of *State v. Fetter*, 25 Iowa, 83, said: "The jury, in substance, should be told that if the defendant's act in taking the life of his wife (if he did take it), was caused by mental disease or unsoundness, which dethroned his reason and judgment with respect to that act, which destroyed his power rationally to comprehend the nature and consequences of that act, and which, overpowering his will, irresistibly forced him to its commission, then he is not amenable to legal punishment." Judge Brewster, in charging the jury in *Commonwealth v. Haskell*, 2 Brews. 497, says: "A review of all the authorities I have been able to examine satisfies me that the true test in all these cases lies in the word 'power.' Has the defendant in a criminal case the power to distinguish right from wrong, and the power to adhere to the right and to avoid the wrong? In these cases has the defendant, in addition to the capacities mentioned, the power to govern his mind, his body, and his estate?" It will be seen from the extracts quoted above, how far those courts have departed from the English rule, on the subject under discussion.

CASES DISCARDING ALL TESTS.—Two cases decided by the supreme court of New Hampshire, the first in June term, 1869, and the other in June term, 1871, may be said to mark an era in the history of the subject of this note. These cases are, *State v. Pike*, 49 N. H. 399; S. C., 6 Am. Rep. 533; and *State v. Jones*, 50 Id. 369; S. C., 9 Am. Rep. 242. Pike was indicted for murder, and tried before Perley, C. J., and Doe, J., October term, 1868, and convicted of murder in the first degree. On the trial, the court instructed the jury, "that if they found that the defendant killed Brown in a manner that would be criminal and unlawful if the defendant were sane, the verdict should be 'not guilty by reason of insanity,' if the killing was the offspring or product of mental disease in the defendant; that neither delusion nor knowledge of right and wrong, nor design or cunning in planning and executing the killing, and escaping or avoiding detection, nor ability to recognize acquaintances, or to labor or to transact business, or manage affairs, is, as a matter of law, a test of mental disease; but that all symptoms and all tests of mental disease are purely matters of fact to be determined by the jury." The court also instructed the jury, that whether there is such a mental disease as dipsomania, and whether defendant had that disease, and whether the killing of Brown was the product of such disease, were questions of fact for the jury. These instructions were approved by the supreme court in the first of the cases above mentioned. Judge Doe delivered, on this occasion, a remarkably able opinion, in which he discussed at length the whole subject of tests of mental disease. It would be obviously impossible in the limits of this note to epitomize the arguments and illustrations of the learned judge. He opens the discussion of this question by saying: "This was the first instance in which such instructions were ever given; but they are an application of ancient and fundamental principles of the common law. A prod-

uct of mental disease is not a contract, a will, or a crime; and the tests of mental disease are matters of fact: *Boardman v. Woodman*, 47 N. H. 147-150. Tried by the standard of legal precedent, the instructions are wrong; tried by the standard of legal principle, they are right." And after reviewing the various tests proposed, he concludes that they are all unsatisfactory, and closes the discussion as follows: "The whole difficulty is, that courts have undertaken to declare that to be law which is a matter of fact. The principles of the law were maintained at the trial of the present case, when, experts having testified, as usual, that neither knowledge nor delusion is the test, the court instructed the jury that all tests of mental disease are purely matters of fact, and that if the homicide was the offspring or product of mental disease in the defendant, he was not guilty by reason of insanity."

In the case of *State v. Jones*, 50 N. H. 369, S. C., 9 Am. Rep. 242, the following charge was decided to be correct: "If the defendant killed his wife in a manner that would be criminal and unlawful if the defendant were sane, the verdict should be 'not guilty by reason of insanity,' if the killing was the offspring or product of mental disease in the defendant. Neither delusion, nor knowledge of right and wrong, nor design or cunning in planning and executing the killing and escaping or avoiding detection, nor ability to recognize acquaintances, or to labor, or transact business, or manage affairs, is, as a matter of law, a test of mental disease; but all symptoms and all tests of mental disease are purely matters of fact to be determined by the jury. Whether the defendant had a mental disease, and whether the killing of his wife was the product of such disease, are questions of fact for the jury. Insanity is a mental disease—disease of the mind. An act produced by mental disease is not a crime. If the defendant had a mental disease which irresistibly impelled him to kill his wife—if the killing was the product of mental disease in him—he is not guilty; he is innocent—as innocent as if the act had been produced by involuntary intoxication, or by another person using his hand against his utmost resistance. Insanity is not innocence unless it produced the killing of his wife. If the defendant had an insane impulse to kill his wife, and could have successfully resisted it, he was responsible. Whether every insane impulse is always irresistible, is a question of fact. Whether in this case the defendant had an insane impulse to kill his wife, and whether he could resist it, are questions of fact. Whether an act may be produced by partial insanity when no connection can be discovered between the act and the disease, is a question of fact." The opinion in this case, which was a very learned and exhaustive one, was delivered by Judge Ladd, and ably supports the views of Judge Doe in the former case. The decisions in these cases have been very highly applauded by some: See 4 Am. L. Rev. 236; 15 Id. 726; Ray's Med. Jur. Ins., sec. 44; Maudsley, Resp. in Ment. Dis. 104. By others they have been more or less severely criticised: See Whart. & Stille's Med. Jur. Ment. Unsoundness, secs. 108 *et seq.*; 1 Bish. Crim. L., sec. 383.

In *Stevens v. State*, 31 Ind. 485, it was decided that an instruction to a jury, that if they believed from the evidence that the defendant knew the difference between right and wrong in respect to the act in question; if he was conscious that such act was one which he ought not to do, and if that act was at the same time contrary to the law of the state, then he is responsible for his acts, is not law. Gregory, J., who delivered the opinion of the court, said, that there were very strong reasons for holding that the charge of Chief Justice Perley, given above, is the true law on the subject. In the case of *Hopps v. People*, 31 Ill. 385, which was decided in 1863, several years prior to the New Hampshire decisions, above referred to, Breece, J., who delivered

the opinion of the court, said: "In the midst of this uncertainty, with the best reflection and examination we have been able to give to this very important and most interesting question, we have come to the conclusion, that a safe and reasonable test, in all such cases, would be, that wherever it should appear from the evidence, that at the time of doing the act charged, the prisoner was not of sound mind, but affected with insanity, and such affection was the efficient cause of the act, and that he would not have done the act but for that affection, he ought to be acquitted." This decision seems to be the forerunner of the decisions in New Hampshire. Whatever may be the final outcome of the conflict between the old and the new doctrine on this subject, it seems to us that, at the present time, the former has on its side the greater weight of authority; the latter the sounder reasons. All admit that the practical difficulties in dealing with the subject of insanity as a defense are very great, owing to our imperfect knowledge of mental disease. No doubt it would be very desirable to have, in the administration of justice, some test or rule by which the law could measure the degree of insanity which renders a man legally irresponsible for his acts. We have seen that various efforts have been made to discover such a test. The success with which these efforts have been crowned has not been great. If in the present state of our knowledge, the discovery of such a test is unattainable, why should we continue to juggle with words, and delude ourselves into the belief that we have that which we do not possess? A very lively conflict has been going on for some years between the lawyers and the doctors, in regard to the test of responsibility in criminal cases, wherein the defense of insanity is set up. The subject is sufficiently difficult to demand the united wisdom of the two professions, and in the interest both of science and of justice it is to be hoped they will unite their energies in an honest endeavor to solve a question which has hitherto mocked the wisdom of the wise in all professions.

BURDEN OF PROOF.—Where a defendant, under indictment for crime, pleads not guilty, and sets up insanity as a defense, upon whom does the burden of proof rest? The authorities on this point are decidedly discordant. Perhaps the greater weight of authority is in favor of the proposition that the burden of proof, in such cases, rests upon the party alleging the insanity: 1 Whart. Crim. L., sec. 60; 2 Bish. Crim. Proc., sec. 670; *Regina v. Stokes*, 3 Car. & K. 188; *Regina v. Layton*, 4 Cox's C. C. 149; *United States v. Lawrence*, 4 Cranch's C. C. 514; *United States v. McGlue*, 1 Curt. 1; *Guiteau's case*, 10 Fed. 161, 163; *State v. Loeffner*, 10 Ohio St. 598; *Bergin v. State*, 31 Id. 111; *Boswell v. Commonwealth*, 20 Gratt. 860; *People v. McDonell*, 47 Cal. 134; *People v. Bell*, 49 Id. 485; *State v. Lawrence*, 57 Mo. 574; *State v. Feller*, 32 Iowa, 49; *State v. Coleman*, 27 La. Ann. 691; *Humphreys v. State*, 45 Ga. 190; *State v. Hundley*, 46 Mo. 414; *McKenzie v. State*, 26 Ark. 334; *Lynch v. Commonwealth*, 77 Pa. St. 205; *State v. Brown*, 12 Minn. 538. But in taking upon himself the burden of proof of insanity, the defendant is only bound to show it by a preponderance of evidence sufficient to overcome the presumption of sanity: 2 Bish. Crim. Proc., sec. 671; *State v. Hundley*, 46 Mo. 414; *People v. Wilson*, 49 Cal. 13; *Commonwealth v. Boswell*, 20 Gratt. 860; *People v. McCann*, 16 N. Y. 58; *Commonwealth v. Rogers*, 7 Metc. (Mass.) 500; *State v. Starling*, 6 Jones' L. 386; *Pannell v. Commonwealth*, 86 Pa. St. 280; *State v. Strauder*, 11 W. Va. 745; *Bond v. State*, 23 Ohio St. 349; *People v. Nancy Hamilton*, 9 Pac. C. L. J. But see *State v. Spencer*, 1 Zab. 196, where it was held that insanity must be proved beyond a reasonable doubt.

Mr. Bishop, in his work on criminal procedure, sec. 673, says: "The doctrine of principle, sustained by a large part of our courts, and rapidly becoming general, is, that as the pleadings inform us, insanity is not an issue by

itself, to be passed on separately from the other issues, but, like any other matter in rebuttal, it is involved in the plea of not guilty, upon which the burden of proof is on the prosecuting power; the jury to convict or not, according as, on the whole showing, they are satisfied or not, beyond a reasonable doubt, of the defendant's guilt." The learned author cites in support of this position the following cases: *Wright v. People*, 4 Neb. 407; *State v. Smith*, 53 Mo. 267; *State v. Crawford*, 11 Kan. 32; and *Westmoreland v. State*, 45 Ga. 225. But these cases do not, it seems to us, fully sustain the author's views in their full extent. No doubt the doctrine laid down by Mr. Bishop would, if generally accepted by the courts, remove a great deal of contradiction and confusion now found in the decisions on this question.

IMPEACHMENT OF WITNESSES: See *Sutton v. Reagan*, 33 Am. Dec. 466; *Franklin Bank v. Pa. D. & M. S. N. Co.*, Id. 687; *Fries v. Brugler*, 21 Id. 52, note 55.

STATE v. HUGHES.

[2 ALABAMA, 102.]

PERSON INDICTED FOR CRIMINAL OFFENSE HAS RIGHT TO BE PRESENT in court pending his trial, that he may discuss questions of law and fact, and point out and argue objections to the action of the jury, or to other proceedings in the cause. This right is guaranteed to him by sec. 10, art. 1, of the constitution of Alabama.

ACCUSED HAS RIGHT TO BE PRESENT WHEN VERDICT IS RETURNED, that he may have an opportunity to poll the jury if he so desires.

NEW INDICTMENT NEED NOT BE PREFERRED against a prisoner where a former judgment of conviction was reversed and the cause remanded for a new trial, unless the indictment was adjudged insufficient.

ACT PROVIDING FOR THE HOLDING OF SPECIAL TERMS of courts for the trial of criminal causes, is not repealed by a subsequent act authorizing such courts, when unable at the regular terms to dispose of all the business pending therein, to hold special terms to be devoted exclusively to the civil and chancery docket. Such acts are entirely consistent with each other, and may both operate together.

RECEIVING VERDICT IN ABSENCE OF PRISONER does not entitle him to a discharge.

INDICTMENT for murder, tried in the circuit court of Dallas. The defendant pleaded: 1. Not guilty; 2. *Autrefois acquit*. The defendant was found guilty, and judgment entered accordingly. The prisoner then moved in arrest of judgment on the following grounds: 1. That the verdict was given in the absence of the accused; 2. That the court erred in charging the jury that an acquittal could only be by a jury under the defendant's plea of *autrefois acquit*; 3. That the reversal by the supreme court was an acquittal of the defendant on the old indictment, and that he could not be retried thereon; 4. That the appointment of the special term for the trial of the cause

was without authority of law. The only proof offered under the plea of *autrefois acquit*, was the certificate of reversal in the supreme court and the opinion of the court in the case.

M. W. Lindsay, attorney-general, for the state.

G. W. Gayle, for the prisoner.

COLLIER, C. J. The tenth section of article 1 of the constitution declares, that "in all criminal prosecutions the accused has a right to be heard by himself and counsel," etc. Again, "and in all prosecutions by indictment or information, a speedy public trial, by an impartial jury of the county, or district, in which the offense shall have been committed; he shall not be compelled to give evidence against himself, nor shall he be deprived of his life, liberty, or property, but by due course of law." This constitutional provision guarantees to the accused the right, not only to discuss questions of law and fact, which may arise, either preparatory to, or pending the trial before the jury, but to point out and argue objections to the action of the jury or other proceedings in the cause. That he may avail himself of this privilege, the opportunity must be afforded him of coming into court and being heard, before he is foreclosed of any legal exception. If a different course is pursued, and a sentence pronounced against him extending to life, liberty, or property, he can not be said to have been convicted "by due course of law." But we need not consider the first cause moved in arrest of judgment, in reference to the provision of our constitution, for so far as it concerns this question, the constitutional declaration is affirmatory of the common law. Mr. Justice Blackstone, in treating of a trial in a criminal case, says: "When the evidence on both sides is closed, and indeed when any evidence hath been given, the jury can not be discharged (unless in cases of evident necessity) till they have given in their verdict; but are to consider of it, deliver it in, with the same forms as upon civil causes; only they can not, in a criminal case, which touches life or member, give a privy verdict."

The precise question we are considering, came before the supreme court of New York, in *The People v. Perkins*, 1 Wend. 91. In that case the prisoner had been indicted for a forgery. When the cause was submitted to a jury, he was committed to jail, and on the coming in of the jury, their verdict was received without the prisoner being brought into court. On being brought up to receive sentence, he objected that he was not present when the verdict was received; and the court of ses-

sions, before which he had been tried, suspended judgment until the advice of the supreme court was obtained. The court said that the verdict was irregular, and, though many of the ancient forms on trials are now dispensed with, the prisoner should have been present on receiving the verdict, that he might have availed himself of the right of polling the jury. And a new trial was consequently granted. In that case it was held to be the clear right of the prisoner to poll the jury; while in the other, it is considered as depending for its exercise upon the discretion of the court: *Commonwealth v. Roby*, 12 Pick. 496, 513; *Fellow's case*, 5 Greenl. 333. But it is exercised, we believe, in all criminal courts in the United States, whether as an acknowledged right or granted *ex gratia curiæ*: *Fox v. Smith*, 3 Cow. 23; *Goodwin's trial*, 18 Johns. 188 [9 Am. Dec. 203]; *The State v. Harden*, 1 Bailey, 3. Lord Hale says, 2 Hale's P. C. 299, that when the jury respond to the general inquiry made of them, by saying they have agreed, the court may examine them by the poll; and such has been understood to be the law in this state, since the organization of the government. This brings us to the conclusion, that by receiving the verdict of the jury, in the absence of the prisoner, he has been deprived of a legal right; and its reception was consequently irregular.

2, 3. The reversal of the conviction of the prisoner, at a previous term of this court, was not intended to operate so as to discharge him from a further trial for the same offense. The cause was then remanded for that purpose, and it is so said in the opinion of the court. There was no necessity for preferring a new indictment; the one already found was unaffected by the judgment of reversal. The insertion of the words, "unless in the interim he should be discharged by due course of law," after the direction that the cause be remanded for a new trial, was dictated rather by a conformity to form than anything else; for it is difficult to conceive how the prisoner could be discharged, otherwise than by an executive pardon, until tried.

4. By the statutes of 1807 and 1819, as consolidated, it is enacted, that "a special session of any circuit court may be held, by order of the judge or judges of the same, whenever it may be necessary, for the trial of criminal causes; and the said judges, at their discretion shall have power, on the application of any person charged with a criminal offense, to hold a special session, for the trial of such person; and the said judges shall direct the sheriff of the county in which such special session shall be holden, to return thereto twenty-four persons, properly

qualified, to serve as jurors, who shall be selected in the manner now prescribed by law, in such cases—any or all of whom failing to attend, or being challenged, or set aside, a jury of bystanders shall be impaneled for the trial of the cause:" Aik. Dig., sec. 14, p. 242.

The prisoner was tried at a special term of the circuit court of Dallas, holden for the trial of criminal causes. At the preceding regular term, the presiding judge stated upon the record his entire inability, in consequence of indisposition, to proceed "with the disposition of the business on the several dockets of the court," and appointed a time when a special term should be holden, and made the appropriate order in regard to the drawing and summoning a jury. It was argued for the prisoner, that the court, at which he was tried, was irregular and unauthorized, because the act of 1826 provides, that when "the circuit courts should not be able to dispose of all the business depending in any of the said courts, at their regular terms, it shall be the duty of the judge of the circuit," etc., to hold a special term, "devoted exclusively to the civil and chancery docket:" Aik. Dig., sec. 16, p. 242. This statute, it is insisted, repeals the previous enactment in regard to special terms for the trial of criminal causes. We think this argument can not be maintained. The statutes are entirely consistent with each other—they have different objects in view, and may both operate together.

Having attained the conclusion that the judgment of the circuit court must be reversed, we are now to inquire what further order shall be made in the cause. In the case of *The People v. Perkins*, 1 Wend. 91, the prisoner was ordered to abide a new trial—that case, we have seen, was in all respects like the present. In *Ned v. The State*, 7 Port. 187, it appeared that the jury, to which the cause of the prisoner was submitted, were discharged, by an order of court, without a sufficient reason therefor, from rendering their verdict. That case, it is insisted, is authority to show that the prisoner, in the present case, should be discharged. The cases, it is conceived, are not analogous. In *Ned v. The State*, the court does an act in despite of the prisoner's rights, which might have operated to his prejudice—in the case before us, the court was merely passive, and under a misapprehension of law, suffered an error to intervene. There, the prisoner was denied the right of trial, by a jury of his own selection—here he was thus tried, but the jury have irregularly returned their verdict. Suppose the prisoner had been in court when the verdict of the jury was received, and had then proposed to poll them, and his

request been refused, would he have been entitled to a discharge? The refusal, we have seen, would have been an error, yet we are of opinion that it would have been a mere irregularity, which would not have put an end to the prosecution. The objection is not that the prisoner was not allowed, upon request, to poll the jury, but that not being in court when the verdict was returned, he had no opportunity of making such a request. He can not certainly occupy a more favorable position than he would do, if the right had been expressly denied.

The judgment of the circuit court is reversed, the cause remanded, and the prisoner directed to remain in custody, to await a trial *de novo*, unless, in the interim, he shall be discharged by due course of law.

ACCUSED, WHEN MUST BE PERSONALLY PRESENT AT TRIAL: See *Sperry v. Commonwealth*, 33 Am. Dec. 261; *Fight v. State*, 28 Id. 626, note 629.

DISCHARGE OF JURY IN ABSENCE OF THE DEFENDANT, because they could not agree, discharges the defendant: See note to *State v. McKee*, 21 Am. Dec. 507, and the cases there cited.

LITTELL v. ZUNTZ.

[3 ALABAMA, 255.]

RIGHT TO SET ASIDE SALE made by order of a court of chancery is one of the attributes of that court.

ENGLISH RULE, TO OPEN SALE whenever advance of ten per cent. on the former sale is offered, is not adopted in this state, being manifestly unsuitable to the habits of our people, and to the state of things existing amongst us.

WHERE STRANGER PURCHASES AT MORTGAGE SALE, it will not be set aside for mere inadequacy of price, however gross, unless there be some unfairness at the sale, or the parties interested are surprised, without fault or negligence on their part; and in no case of this kind will it be set aside after confirmation, unless fraud can be imputed to the purchaser, which was unknown to those interested when the confirmation was made.

BIDDINGS WILL BE OPENED ONCE, WHERE MORTGAGEE IS PURCHASER, and the debt is not dischargee by the sale, if a reasonable advance is offered, together with costs and expenses, which should be deposited in court. In such case an advance of at least ten per cent., and in no case of less than two hundred dollars, will be required.

PREVALENCE OF YELLOW FEVER AT TIME AND PLACE OF SALE, owing to which a large part of the population had removed, and business had been generally suspended, furnishes a good ground for setting aside the sale, and for excusing the non-attendance of the mortgagee.

SALE CAN ONLY BE SET ASIDE UPON PAYMENT TO THE PURCHASER of the purchase money, of all sums laid out by him in improvements, and of a liberal allowance for all trouble, costs, and expenses incurred by him.

PURCHASER CAN NOT BE CHARGED WITH RENT, where sale is set aside, unless he has actually received it.

PETITION filed by Littell against Zuntz, to set aside a sale made by the master, pursuant to a decree of foreclosure in a suit brought by him against one Warren. The amount due on the mortgage, for which the lands were ordered to be sold, was nine thousand four hundred and ninety-one dollars, with interest. The premises were sold by the master on the first Monday in September, 1839, when the yellow fever was at its crisis in Mobile, where the sale took place, and when most of the inhabitants, who had the means, had left the city on account of the pestilence. The sale was held in the center of the contagion. The property was amply sufficient to satisfy the mortgage. The defendant purchased the premises for the sum of five hundred dollars. Neither the petitioner nor his attorney was present at the sale. The facts above stated were alleged in the petition, and were substantially established by affidavits filed by the petitioner. Zuntz answered the petition, admitting the fact of the purchase at the time and place and for the amount alleged. He alleged that one Collins, agent of the petitioner, was present at the sale, and made no objection. He alleged that he had expended five hundred dollars in improving the premises since his purchase, and had been put to other costs and trouble. Upon the hearing of the motion to set aside the sale, the chancellor dismissed the petition, and decreed that the report of the sale stand confirmed. To this decree the complainant prayed an appeal to this court, which was granted.

Stewart, for the petitioner.

Campbell, contra.

ORMOND, J. In England, it is almost a matter of course to open the biddings, when a larger sum is offered for the property before the confirmation of the sale, and in some instances afterwards. By a long series of adjudications, it has been perfected into a system; and as the general rule, the bidding will be opened whenever an advance of ten per cent. on the former sale is offered. This is shown conclusively by the cases referred to by the plaintiff in error, to which many might be added.

This is the first time the question has been raised in this court; and we are not aware that the practice of opening the biddings upon the principles of the English chancery, has ever obtained in this state. But the right to set aside a sale made by an order of the court of chancery, when a proper case is presented, must

of necessity be an attribute of that court, as the same power is exercised by a court of law, when its process has been abused, and the power of a court of chancery certainly can not be inferior. We feel ourselves, therefore, authorized to lay down certain rules to regulate this proceeding in future, founded on the principles of natural justice, and having reference to the actual existing state of things in this country. We do not think it proper to adopt the English rule in all its extent, as it is manifestly unsuitable to the habits of our people, and to the state of things existing amongst us. In England, land has a fixed and determinate value, and does not fluctuate in the market like personal property; but with us the value of land is exceedingly fluctuating, and its price frequently varies very much in the course of a few months, and is affected generally by the same causes which operate on personal property. Indeed, it may be said that its price is not so fixed and stable, because not in such general demand as one species of our personal property—slaves. To open biddings in all cases, therefore, would be exposing the purchaser to a higher bid, if from any cause, land should rise in price, whilst he would be compelled to keep it if it fell. This would be obviously unjust as to the purchaser, and contrary to public policy; as it would injuriously affect all sales of this character, and thus defeat the very object of the rule itself. We are therefore of opinion, that when a stranger is the purchaser at a mortgage sale, it will not be set aside for mere inadequacy of price, no matter how gross, unless there be some unfair practice at the sale, or unless those interested are surprised, without fault or negligence on their part; and in no case of this description, after a confirmation of the sale, unless fraud can be imputed to the purchaser, which was unknown to those interested at the time of the confirmation of the sale.

But where the mortgagee is the purchaser, and the debt secured by the mortgage is not discharged by the sale, no reason is perceived why the biddings should not be opened once, upon the offer of a reasonable advance on the former sale, together with the purchaser's costs and expenses, which should be deposited in court; what would be a reasonable advance, would to some extent depend on the amount in controversy. In the English chancery, the rule is to require an advance of at least ten per cent. on the first sale, besides costs and expenses; but in no case will the biddings be opened, where the deposit is less than forty pounds: 1 Sim. & Stu. 20; which rule is probably as good, as a general rule, as any that could be adopted. The reason for

the distinction here made between the purchase by a stranger and the mortgagee, is to prevent the oppression, which it is in the power of the mortgagee to practice, in putting down competition at the sale, by preventing any one from obtaining the property, unless he gives its value. The object of the sale is not to transfer the property of the mortgagor to the mortgagee, but to pay the debt; he can not therefore be injured by any proceeding, which has that for its object, and does not cause any unnecessary delays or expense: *Duncan et al. v. Dodd*, 2 Paige, 99; *Williamson v. Dale et al.*, 3 Johns. Ch. 290; *Woodhull, Ex'r, v. Osborne*, 2 Edw. 614.

In this case, property worth eight thousand dollars, was sold by the master for five hundred dollars. The purchaser was a stranger, attracted to the sale by the advertisement; and according to the principles here laid down, notwithstanding the inadequacy is so gross as almost to demonstrate the unfairness of the sale, it can not be set aside, unless the complainant, who in this case is the petitioner, can show surprise, unmixed with fault, or neglect on his part. The sale was made at a time when the yellow fever was raging in the city of Mobile; when according to the affidavits filed by the petitioner, the alarm created by the pestilence, had driven from the city a large portion of its population, and suspended the business and commerce of the city, at least to a very great extent. In our opinion, this affords an ample reason for setting aside the sale. It is impossible to suppose, that under such circumstances, property exposed to sale, could bring anything like its fair value, not alone by withdrawing competition, but also because the presence of the destroying pestilence, would indispose the minds of most men to make investments of any kind; and it was doubtless owing to these causes, that the property in question did not bring one fifteenth of its value. It also furnishes a sufficient excuse for the absence of the complainant at the time of the sale.

The defendant in his answer states, that one Collins, the agent of the plaintiff, was present at the sale, and interposed no objection. But there is no proof that Collins was the agent of the plaintiff, even if we consider the affidavit of the master, as regularly sworn to, and a part of the record, which appears to be doubtful. His statement is, that he "understood that Collins was the agent of the plaintiff, and saw him on the ground a short time before the sale of the property." This is not sufficiently definite to charge the plaintiff with notice of the sale. If Collins was in fact the agent of the plaintiff, and present at the sale,

nothing could have been easier, than to have established it conclusively.

But although for these reasons the sale must be set aside, it can only be done on payment to the defendant of the purchase money, of all sums laid out in improvements on the property, and a liberal allowance for all trouble, costs, and expenses incurred by him. It is also insisted by the counsel for the plaintiff in error, that the defendant should be charged with the value of the use of the property, during the time he has held it, or at least for the rent which has accrued, if he has rented out the property. The defendant was let into the possession of the property as a purchaser without fault on his part, and his purchase can not with propriety be changed into a tenancy, so as to charge him with rent for the use of it. But if he has not occupied it himself, but has rented it out, no reason is perceived why he should not account for the rents actually received by him. The object of the court is to place him as near as possible, and without injury to him, in the same situation, as if he had never made the purchase; and therefore, although he should not be charged with rent, if he had occupied the premises himself, no reason is perceived why he should be allowed to rent to another, and thus make a profit to himself by an invalid sale.

The decree of the chancellor, therefore, confirming the report of the master, is reversed, and this court, proceeding to make such decree as should have been made by the chancellor, hereby order and decree that the report of the master be vacated, and the sale made by him be annulled, and the deed for the premises, if any was made, be produced and canceled. That the master be directed forthwith to state an account between the parties, charging the plaintiff with the purchase money, the amount of all expenditures, and costs laid out in the actual improvement of the property, with interests thereon, and a liberal allowance for the trouble of the defendant; and charging the defendant with the amount of the rent actually received by him, with interest, and if the balance be found against the plaintiff, it shall be paid on confirmation of the report; if in his favor, a decree shall be rendered for the sum thus found due the plaintiff; and any claim for rent not received shall be transferred to the plaintiff; and thereupon the master shall proceed to sell the premises as provided in the original decree. Each party will pay his own costs in this court.

Let the cause be remanded for further proceedings.

HUSSEY AND WIFE v. ELROD AND WIFE.

[2 ALABAMA, 339.]

ADMISSIONS OF WIFE ARE NOT ADMISSIBLE to charge her husband in an act against them for an assault and battery committed by her

ERROR to Talladega circuit court. Trespass brought by the plaintiffs, to recover damage for an assault and battery committed by the wife of the defendant upon the wife of the plaintiff. The defendant obtained a verdict and judgment. From the bill of exceptions it appeared that the plaintiff offered to prove the assault and battery complained of, by the confessions or admissions of the wife of the defendant. The court rejected this offer, and the plaintiff excepted.

Chilton, for the plaintiff in error.

Wm. B. Martin, contra.

ORMOND, J. The general rule of law is, that husband and wife can not be witnesses, either for or against each other, either in civil or criminal proceedings. The rule is founded on the identity of their interest, and because it is necessary to guard the security and confidence of private life, which would be constantly invaded, if the married pair, in this respect, stood towards each other, as they do towards the rest of the world. It would seem to follow that, as the wife can not give evidence, so neither can she charge her husband by an admission; for that would let in all the mischief which the rule is designed to prevent. It was so held in the case of *Denn v. White and Wife*, 7 T. R. 112, and *Hawkins v. Hatton and Wife*, 2 Nott & M. 374. The admission of a wife, during coverture, of a debt due before marriage, is not admissible as evidence against the husband: 1 Halst. 366.¹

There is no error in the judgment of the court below, and it is therefore affirmed.

ADMISSIBILITY OF TESTIMONY OF HUSBAND AND WIFE for or against each other: See *State v. Jolly*, 32 Am. Dec. 656, and note 660, where other cases in this series are collected.

1. *Ess v. Winners*.

FOARD v. JOHNSON.

[2 ALABAMA, 565.]

NOTICE OF NON-PAYMENT OF BILL OF EXCHANGE DEPOSITED IN THE POST OFFICE and addressed to the drawer at the place where the bill is dated, is not sufficient to charge him, unless that was the post-office nearest his residence, or unless the holder, upon diligent inquiry, was unable to ascertain his residence.

ASSUMPSIT on a bill of exchange drawn by the plaintiff in error, at Mobile, and indorsed to the plaintiff below. The cause was tried on the general issue. The plaintiff below offered in evidence the bill declared on, and a notice of non-payment and protest, which it was shown was deposited in the post-office at Mobile, directed to the defendant at that city. The defendant then proved that he resided in the county of Sumter when the bill was drawn, and had ever since continued to reside there. The defendant then moved the court to charge the jury that the notice of non-payment was insufficient. The court refused to charge as requested, and the defendant excepted. There was a verdict and judgment for the plaintiff, and the defendant prosecuted a writ of error to this court.

Boyd, for the plaintiff in error.

J. B. Clark, for the defendant in error.

COLLIER, C. J. The only question raised at the argument was this: Where a bill is dated at a particular place, can the drawer be charged by a notice of non-payment, deposited in the post-office, addressed to him at that place, although it appear that he did, at the time the bill was made, and has ever since resided elsewhere, much nearer other post-offices than that in which the notice was deposited? In the case of *McGrew v. Toulmin*, 2 Stew. & P. 436, Judge Taylor held, that it was not sufficient to look for the drawer at the place the bill was dated, if his residence be elsewhere. Drafts are often in the course of trade drawn in one place by persons who are known by all the parties to them, to live at another. To sustain his conclusion the learned judge cites *Fisher v. Evans*, 5 Binn. 541, which is a case directly in point. But it has been insisted in argument, that upon this point *McGrew v. Toulmin* is overruled by *Robinson and Davenport v. Hamilton*, 4 Stew. & P. 91. In that case the bill was drawn at "Wigginsville." It was proved that at maturity it had been regularly protested for non-payment, and a notice thereof directed to the drawer at "Wigginsville," de-

posited in the post-office at Mobile. There was no evidence that the plaintiff knew of the drawer's residence, or whether there was a post-office at Wigginsville. The circuit court charged the jury, that the plaintiff had not used due diligence; unless they believed that there existed a post-office at Wigginsville; or that the defendant had, in fact, received notice. Judgment being rendered for the defendant, the plaintiffs brought their case into this court. Lipscomb, C. J., in delivering the opinion of the court, said: "The drawer of the bill had designated his place of residence as Wigginsville. It was in his power to have given it a more particular description; his failing to do so, in all probability, misled the plaintiff. They may well have inferred from the description given, that the place was of sufficient notoriety to dispense with any other. If the maker's place of residence was not known to the holder, and he could not ascertain it by using reasonable diligence, it would relieve him from the necessity of giving notice. We are therefore of opinion, that the notice was sufficient, unless the knowledge had been brought home to the holder of the bill, that there was no post-office at 'Wigginsville,' or that the maker resided at or near a post-office."

The court supposed, first, that the place where a bill was dated, was to be regarded as the drawer's residence; that a notice addressed to him at that place by mail was sufficient, unless the holder knew that there was no post-office there, or that the maker resided at or near a post-office. True, it has been held, that where the drawer dates his bill generally as "Manchester," that a notice directed to him equally general sufficed: *Mann v. Ross*, Ry. & M. 249.¹ But the question in that case, was not whether the place where the bill was dated, indicated the drawer's residence so conclusively, as to make a notice sent there sufficient; but it was, as to the generality of the direction of the notice, or whether the street and number of the drawer's residence, in a city as large as "Manchester," should not have constituted a part of the drawer's address.

In *Chapman v. Lipscombe*, 1 Johns. 294, the bill was drawn and dated at New York, but the drawers resided at Petersburg, and the question was, whether notice should not have been sent to the latter place. There was no evidence that the holder knew that the defendants resided there; he made inquiry at the banks and elsewhere, and being informed that the drawers resided at Norfolk, he sent a notice, by mail, to them at that place,

1. *Mann v. Moore*, Ry. & M. 249.

and another addressed to them at New York. This was held sufficient. The court cited this case, to sustain their opinion in *Robinson and Davenport v. Hamilton*; but it will be seen that it is very dissimilar, both in its facts, and the principles on which it rests. If the place where the bill was dated, was to be regarded as the drawer's residence, a notice sent to New York would have been considered sufficient, without proof, that the holder had made inquiry upon that subject; but the holder was only excused from giving due notice, upon the ground that, after employing reasonable diligence, he could not ascertain where the drawers resided. Such an excuse is always available: Chit. on Bills, 486 *et post*, and cases cited, 9th Am. ed.; *Williams v. The Bank of the United States*, 2 Pet. 96; *Galpin v. Hard*, 3 McCord, 394 [15 Am. Dec. 640]; *Preston v. Dayson et al.*, 7 La. 7. The most thorough examination has not furnished us any other case, than that cited from 4 Stewart & Porter, in which the place where a bill is dated is regarded such evidence of the drawer's residence, as to relieve the holder of the bill from the necessity of inquiring on the subject; and upon principle, it can not be so considered. By giving locality to the act of drawing a bill, the drawer admits that he is at that place, at that time; but certainly not, that he will be there at the maturity of the bill. The right of locomotion is accorded to all, and none exercise it more frequently than those engaged in commerce.

It was then incumbent upon the holder of the bill in question, if ignorant of the drawer's place of residence, to have made diligent inquiry to ascertain it, and when ascertained there to have sent the notice. As this course was not pursued, the county court erred in its refusal to instruct the jury as prayed; its judgment is consequently reversed, and the cause remanded.

NOTICE OF NON-PAYMENT, WHAT SUFFICIENT: See *Stephenson v. Primrose*, 23 Am. Dec. 281, note 288.

CAMP v. CAMP.

[2 ALABAMA, 682.]

COURT OF CHANCERY WILL RESCIND CONTRACT FOR PURCHASE OF LAND, where the vendor represented to the vendee that a field of forty acres of rich bottom land on an adjoining tract was included in the purchase, although such vendor had been previously informed by the owner of such tract, that he had run out the line between them with a pocket compass, and had ascertained that the field belonged to him.

ERROR to the chancery court at Talladega. The opinion states the case.

Chilton, for the defendant in error.

ORMOND, J. The bill prays a rescission of the contract, on the ground that it was obtained by the fraudulent representations of the defendant. The facts are, that the complainant being about to purchase land of the defendant, made an examination of it with him for the purpose of ascertaining whether it contained a sufficient quantity of valuable land to suit him. On one of the boundary lines of the tract, half a mile in length, no marks of the surveyor could be discovered but one third of the distance from one of the corners. That portion of the line not marked, was bounded by the lands of Colonel McElderry, who had cleared a field of rich bottom land, forty acres of which the defendant represented to the complainant to be part of the land he was then offering to sell; pointed out where the line would cross the fence, and designated the course of the line through the field, by a reference to standing trees. It is now ascertained, that not more than one acre of this land belongs to the tract sold by defendant to complainant. The defense set up by the answer and by the argument of counsel is, that the representations were matter of opinion merely. The proof is conclusive to show, that the representations were made, and that the defendant, before the sale, had information that the line did not run as he represented it.

An examination of the case has satisfied us that the contract was obtained by the representations of the defendant of material facts, which he must have known at the time to be untrue, and also that he concealed material facts within his knowledge, which fair dealing required that he should have disclosed. The complainant was a stranger in the neighborhood, and had never seen the lands before. The defendant, who was the owner, was well acquainted with it. It would naturally be an object of interest with him to know how the lines of his tract ran in reference to this piece of valuable bottom land, which, if included within his tract, would greatly increase its value; and accordingly we find, that it had been the subject of conversation between him and the adjoining proprietor, who had the same interest; and that the latter had informed him that if the marks of the line which could be found were correct, that the land belonged to him, as he had run it out himself with a pocket compass. Yet with this information of where the line did run, we find him not only concealing it from the complainant, but undertaking to point out precisely where the line would run through the field, designating the point where it would cross

the fence, and its course through the field, by a reference to sensible objects upon or near the supposed line.

It is certainly true, that the course of the unmarked line, to one who had no other guide than the extreme points, would be matter of opinion or conjecture. Is the conduct of the defendant explicable on this hypothesis? It has already been remarked that as the owner of the land, he must have felt considerable interest in ascertaining this fact; when this is considered in connection with the manner in which the information was given, the designation of the precise spot where the line would enter the field; the indication of its precise course through the field, the quantity of fine land which would be thus added to a tract, which appears to be quite sterile, there can be but little doubt of the *quo animo*. But when to this is added the startling fact, that he was informed by one who had run the line, that it was different from his representations of it, but little doubt can exist that the intention was to deceive. The principles of justice and fair dealing, demanded of him a disclosure, that though such was his opinion (if in fact he entertained it), that the line had been run out by another, and that by his survey the field was excluded. Had he done so, there can be no doubt that the purchaser would have insisted on a survey of the land, to ascertain its true boundary. It is impossible not to see in the whole conduct of the defendant a studied attempt to deceive, not only by the assertion of a fact, which he either knew nothing about, or knew to be untrue, but also, by the concealment of a fact, which if disclosed, would have deprived his assertions of any claim to belief.

It is contended, that the law will not assist a purchaser, who does not inquire and examine for himself, but supinely rests on the opinions of those with whom he is dealing. The true meaning of this rule is, that the purchaser must judge for himself, as to all those matters which lie in opinion merely; as for example, as to the value or quantity of the article he is about to purchase; assertions upon these matters, by the vendor, should pass for nothing; so also, if he should falsely attempt to bolster up his declarations by imaginary opinions of others, these are the common artifices or tricks of trade, which every one competent to make a contract, is, by law, presumed able to guard against. Nor is the seller under any legal obligation to call the attention of the purchaser to those qualities of the article offered for sale, open to common observation, which depreciate its value, but he must not resort to any artifice to conceal them. But the law is

not so destitute of morality, as not to require each of the contracting parties to disclose to the other all material facts, of which he has knowledge, and of which he knows the other to be ignorant, unless they are open to common observation; and not to forbid any intentional concealment, or suppression of the material facts necessary to be known, and to which the other has not equal access, or means of ascertaining: 2 Kent's Com., 1st ed., 377, and cases cited in support of the text.

It is true, the complainant might have refused his confidence to the representations of the defendant, and insisted on a survey to ascertain the boundary; but whilst the law exacts ordinary care and diligence on the part of the purchaser to ascertain the quality and quantity of the article he is about to purchase, and "does not go the romantic length of giving indemnity against the consequences of indolence or folly, or a careless indifference to the ordinary and accessible means of information," it does not exact extraordinary diligence, but as to those facts which by ordinary diligence could not be ascertained, it permits a reliance on the assertions of the party, who from his opportunities, has the means of knowledge. Thus at the last term, in the case of *Young v. Harris, Adm'r*,¹ this court relieved a purchaser who was a stranger in the country, and relied on the assertion of the vendor, that he had title, when in fact, the land had been entered in the name of an infant son of the vendor, which could have been ascertained by application at the land office; and on the ground, that when there was no cause for distrust, such extreme diligence was not required. So in this case the complainant might have insisted on a survey of the land, but we can not think he was guilty of folly, or supine negligence in trusting to the positive declarations of one who, from his situation, might well be presumed to know the facts he undertook to state, and from his relationship, it might be supposed he would not voluntarily deceive.

It is supposed by his honor the chancellor, that it is not yet satisfactorily established, that the cleared land, which is the subject of this controversy, is not a part of the land purchased. The line in dispute is a range line, and so far as the marks can be ascertained, it must be assumed to be correct. The unmarked part of this line, according to the proof of Colonel McElderry, has been surveyed by the county surveyor, and by the line thus run, the cleared field except about an acre is on his land; and until this survey is impeached, we presume it to be correct.

What the witness meant by saying on the cross-examination, that the line thus run "was not established as the true line," we do not comprehend. The survey by a competent person, such as we must presume the county surveyor to be, would be sufficient proof of the situation of the disputed line to authorize either a court or jury to act on it as a fact proved in the cause. It could not, in a legal sense, "be established as the true line;" but by the finding of a jury in a suit to settle the boundary. It is probable that the witness meant that the survey was not recorded in the office of the county court, as the statute requires. But it is certain, from the proof, that a survey was made by a competent person, and the result of that survey, until impeached, is at least *prima facie* evidence. It is not however important whether this fact is proved or not, as it is expressly alleged in the bill, that the cleared land, which was the subject of the representation made by the defendant at the time of the sale, is not a part of the land purchased by the complainant, and this fact is admitted by the defendant; it was, therefore, not only unnecessary to prove it, but it could not be disproved.

The result of our examination is, that the complainant is entitled to the relief he asks for, and that the chancellor erred in dismissing the bill. The decree should have been, that the contract be rescinded, and that the notes and title bond be canceled. That the complainant recover the negro woman taken in part payment, if to be had, with legal interest on the sum she was estimated at, during her detention, or her value, as estimated by the parties. That an account be stated between the parties charging the complainant with the value of the occupation of the land, if any, and the defendant with the value of all valuable and lasting improvement made there previous to his offer to rescind the contract.

Let the cause be remanded for further proceedings.

RESCISSIION OF CONTRACT FOR DEFICIENCY IN QUANTITY OF LAND: See *Pringle v. Samuel*, 13 Am. Dec. 214, and note 218, where other cases in this series are collected.

WARE v. BRADFORD.

[2 ALABAMA, 676.]

DEPENDANT CAN NOT AVAIL HIMSELF OF AN OBJECTION TO THE DECLARATION in an action of trespass to try title, after he has pleaded "not guilty."

SHERIFF'S DEED CAN NOT BE COLLATERALLY IMPEACHED for any irregularity in his proceedings, or in the process under which he acts. In such a case

a judgment, execution thereon, a levy, and the sheriff's deed are all that need be shown.

STATUTE REQUIRING SHERIFF TO ADVERTISE LANDS which he is about to sell under execution, thirty days before the sale, is merely directory.

ERROR to the circuit court of Talladega county. Trespass to try title. In the indorsement on the writ the land sought to be recovered is thus described: The south-east quarter of the north-east quarter of section one in township nineteen of range four east; and all that part of the south half of said section one, in said township and range, that is not included in a deed from defendant to William Thompson, in possession of the defendant. In the declaration the same description is given, except that the north half is substituted for the south half. The jury found for the plaintiff, and described the lands in their verdict. The only error in this description was the use of the word "to" for "by," as stated in the opinion. The other facts appear from the opinions.

Peck, for the plaintiff.

Stone, contra.

GOLDTHWAITE, J. The plaintiff in error has relied, chiefly, on two positions, as showing error in the proceeding now to be examined. The first of these relates to the supposed variance in the description of the lands recovered by the verdict, from those described in the declaration; and the second embraces all the supposed errors, and irregularities in the advertisement, and other proceedings previous to the execution of the deed.

The description of the lands in the declaration is very vague and indeterminate. It can only be made certain by reference to a deed which is not pretended to be set out. This point was very fully considered in *Sturdevant v. The Heirs of Murrell*, 8 Port. 317, and the conclusion, then, was, that in such a case as this, the declaration ought to describe the land in controversy with so much certainty and precision, as will inform the defendant what he is to defend against. But it was also held in that case, that after plea pleaded the objection to the declaration was unavailable, unless the insufficient description was also carried into the verdict and judgment. This decision was made in the terms of the statute of 1811, which provides, that after issue joined in an ejectment upon the title only, no exception to form or substance shall be taken to the declaration in any court: Aik. Dig., p. 266, sec. 46. We think it evident, that the north half has been inserted in the transcript by a clerical mistake, as the

indorsement of the writ corresponds in this particular with the verdict, and it is entirely out of the question, from all the evidence in the case, that the controversy had anything to do with the north half of the section of which the one eighth had been before stated with certainty of description. We should feel well warranted, therefore, in deciding this to be a clerical error, and consequently, would omit to notice it, or consider it as amended.

2. But independent of this, we think it is covered by the statute. If no objection can be raised to the declaration after verdict, it can not be placed in connection with any other matter to show error, unless it be made a part of the subsequent proceedings. And in the latter event, the objection would not be to the declaration as such, but to the insufficiency of the verdict, if that formed the subject of complaint. Such was the case in *Sturdevant v. Murrell's Heirs*, before cited, when an insufficient description in the declaration was referred to as the description of the land in the verdict. We think that the variance can not be now considered, and the verdict is certain and distinct. The only error consists in one of the lines running to the section line to the half-mile stake, when it would have been more precisely accurate to have said by the section line to the stake.

3. All the questions raised at the trial with respect to the supposed irregularities may be disposed of with a very brief examination. Lands are declared subject to the payment of all judgments and decrees by the ninth section of the act of 1812: Dig. 163. And by the same act it is declared, that the sheriff shall make a title to the purchaser, which shall vest all the defendant's title, etc. It is true, that by the same statute the sheriff is required to advertise the lands thirty days, but we consider this to be a direction to the sheriff merely, and can not avoid the sale when the inquiry is as to the effect of the sheriff's deed. The question here presented, though novel in our own state, has frequently received adjudication elsewhere, and it may be assumed as settled law, that a sheriff's deed can not be collaterally impeached for any irregularity in his proceedings, or in the process under which he sells. All that is essential in such a case, is a judgment, execution thereon, levy, and the sheriff's deed. In the case of *Wheaton v. Sexton*, 4 Wheat. 503, the supreme court of the United States expressed some astonishment, that a similar question should be raised in that court, and say that the purchaser depends on the judgment, the levy, and the deed.

All other questions are between the parties and the marshal. So also, it has often been held, that the purchaser is not bound or affected by the irregular acts of the officer, or of the plaintiff, in which he did not participate: *Kinney v. Scott*,¹ 1 Bibb, 155; *Bearden v. Searcy's Heirs*, 2 Id. 202; *Brown v. Miller*, 3 J. J. Marsh. 435. Other cases might be adduced from other states, but it is unnecessary.

The reason why these irregularities do not form the subject of inquiry between the purchaser and the defendant in execution, seems to be, that the latter has an adequate remedy against the sheriff, for any injury he may have sustained. Another reason why he will not be permitted to attack the deed collaterally, because the court, where the judgment exists, can control the improper action of the sheriff, and set his proceedings aside, if any injury has resulted from his irregularities. This was held by this court in the case of *Mobile Cotton Press and Building Co. v. Moore and Magee*, 9 Port. 679, where an irregular sale was set aside, after the execution of the sheriff's deed. We are satisfied that the defendant can only inquire into the validity of the judgment in those cases, where his right has been divested by a sheriff's sale, after the levy of an execution. All other questions are between him and the plaintiff, or between the parties and the sheriff, or those claiming under him in a direct proceeding to set aside the deed for irregularity in the sale, etc. When this is not done, the title of the purchaser can not be impeached for any irregularity.

This leads to the conclusion, that the circuit court did not err in the charges given and refused. The other questions presented by the exceptions have not been seriously pressed, and we do not consider ourselves called on to examine them.

Let the judgment be affirmed.

COLLIER, C. J. After the defendant has pleaded "not guilty," to an action of trespass, to try titles, he can not avail himself of an objection to the declaration. But the proof of the plaintiff must conform to his declaration—it is there we are to look, to ascertain what is in issue between the parties. If the plaintiff adduces evidence to prove his title to lands not described in the declaration, such proof is clearly inadmissible, and does not entitle him to recover. Whether in the present case, the declaration as copied into the record, does not discover a clerical error, rather than a substantial misdescription of the land, we need not inquire.

1. *McKinney v. Scott*.

LITTLE v. BEAZLEY.

[2 ALABAMA, 702.]

SIGNATURES PROVED TO BE IN A DEFENDANT'S HANDWRITING can not be given in evidence to the jury, to enable them to determine, by a comparison with a disputed signature, whether the latter is genuine or not.

ERROR to the county court of Sumter county. Assumpsit on a promissory note. The plea put in issue the execution of the note, and there was a verdict and judgment for the defendant. The plaintiff offered in evidence proven specimens of the defendant's handwriting, to be by the jury compared with the writing and signature of the note; but the court excluded them, and the plaintiff excepted, and brings this writ to reverse the opinion of the county court on this point.

Reavis, for the plaintiff in error.

Jones, *contra*.

GOLDTHWAITE, J. This is one of those questions upon which so much has been said and written, that a review of all the cases would be alike impracticable and uninteresting. We shall, therefore, content ourselves with declaring the rule as we consider it to exist at the present day. Comparison of handwriting by submitting different writings having no connection with the matter in issue, is not permitted by law. The present case presents the naked question, whether signatures proved to be in the defendant's writing, can be given in evidence to the jury, to enable them to determine, by a comparison with the disputed signature, whether the latter is genuine or otherwise. In our opinion, this was not competent evidence. We decline entering into a discussion, whether there are any cases in which mere comparison is permitted, though it is obvious, that when more than one paper is before the jury as evidence, a comparison will be made, if any dispute takes place, as to the authenticity of either. We may also add our wish to be considered as neither deciding nor intimating an opinion on any other than the precise question now presented.

Let the judgment be affirmed.

COMPARISON OF HANDWRITING: See *Moody v. Russell*, 28 Am. Dec. 317, and note 323, where other cases in this series are collected.

MEADOR v. SORSBY.

[2 ALABAMA, 712.]

LANDS ACQUIRED BY TESTATOR AFTER EXECUTION OF HIS WILL do not pass by a general devise therein.

POWER IN WILL TO SELL ALL THE ESTATE OF THE TESTATOR does not authorize the executor to sell after-acquired lands.

ORDER OF COUNTY COURT DIRECTING ADMINISTRATOR WITH WILL ANNEXED to sell lands, acquired by the testator after the execution of the will, is null.

EQUITABLE ESTATE IS GOVERNED BY SAME RULES AS PURELY LEGAL ESTATE, so far as the power to pass after-acquired lands by will is concerned.

PURCHASER AT EXECUTOR'S SALE OF LANDS, the equitable title to which was acquired by the testator after the execution of the will, may rescind the contract, notwithstanding the holder of the legal title offers to deliver to him a conveyance of the lands. Such purchaser will not be compelled to receive a title that may be disputed, and the minor heirs of the deceased would not be precluded from asserting their title after they came of age.

ERROR to the court of chancery for the third district of the southern division. The bill seeks a rescission of a contract for the purchase of lands. The complainant purchased the lands in question at a public sale, conducted by the defendants as the administrators with the will annexed of James Meador. The complainant gave his note for the amount of the purchase price, and received a bond executed by one of the defendants, conditioned to make a good and sufficient title in fee simple for the lands. The chancellor decreed a rescission of the contract. The other facts sufficiently appear from the opinion.

Pierce, for the plaintiff.

Jones, *contra*.

GOLDTHWAITE, J. 1. The principal question involved in this case is, that which relates to the power of the defendants to sell the lands, which were the subject of the contract sought to be rescinded, either under the will of their testator, or under the order of the county court. The order of the county court is not very much relied on; nor can it be, for it directs the defendants to sell the lands in accordance with the will; and there have been no proceedings under any of the statutes which permit a sale to be decreed under peculiar circumstances. We may then dismiss the order of court from consideration; for it is very clear, that the contract is not warranted by that alone. At first we were inclined to think it would be necessary to look into the

evidence to ascertain when the title of the deceased Meador commenced; but on a more particular examination, we find a very distinct admission, that the title bond from Kirkpatrick was executed on the thirtieth of January, 1835; and the subsequent declaration, that the defendants can not state when their testator obtained the possession of the land, whether before or after the date of his will, is wholly unimportant, for the reason that the equitable title is not shown to have existed at any time anterior to the date of the bond. Our statute of wills is not very dissimilar from those in force in England, and is in these words: Every person of the age of twenty-one years, of sound mind, lawfully seized of any lands, tenements, or hereditaments, within this state, in his own right in fee simple, or for the life or lives of any other person or persons, shall have power to give, devise, and dispose of the same by last will and testament in writing; provided, etc.: Aik. Dig., p. 448, sec. 1.

It is the settled law of England, that after-acquired lands are unaffected by a will: *Antkin v. Bakerham*,¹ Rep. temp. Holt, 750. The same doctrine has been held and frequently acted on in this country: *McKinnon v. Thompson*, 3 Johns. Ch. 307; *Livingston v. Newkirk*, Id. 312. In Virginia, where the statute authorizes the disposition by will of the lands which the testator has, or, at the time of his death, shall have, it has been held, that the intention of the testator to make his will apply to after-acquired lands, should appear in the will: *Hamersly v. ———*,² 3 Call, 289. And this construction of the statute was confirmed by the supreme court of the United States in the case of *Smith v. Edrington*, 8 Cranch, 67. The same rule seems to prevail in Kentucky: *Halloway v. Buck*, 4 Litt. 293. We are not aware of any decisions elsewhere to the contrary. It is scarcely necessary to add, that it is not essential that the testator should be seized of a legal estate at the time when the will is made. If he has an equitable estate merely, it is governed by precisely the same rules as if it was purely legal: *Langford v. Pitt*, 2 P. Wms. 629; *Potter v. Potter*, 1 Ves. 437. If we now ascertain the facts connected with the case, it will be seen that the will was made in 1833; and the lands which were sold under the supposed power contained in the will, were not acquired by the testator until 1835. At the latter period, he purchased them from Kirkpatrick, who executed a bond to make him titles. The testator thus became seized of an equi-

1. *Arthur v. Bockenhorn*.2. *Allen v. Harrison*.

table estate of inheritance, which, at his death, descended to and vested in his heirs at law.

2. But it is urged that, although the equitable title descended, yet the will contains a power to sell all the estate of the testator; and that this power may attach to the lands, although the lands themselves may not pass by the will. This position has frequently been overruled in England; and we are not aware that the correctness of the rule there established has ever been questioned: *Langford v. Eyre*, 1 P. Wms. 72;¹ *Wagstaff v. Wagstaff*, 2 Id. 258; *Jones v. Clough*, 2 Ves. 366.

3. The subsequent attempt to invest the complainant with the legal title, can have no effect to make him chargeable on the contract, because it is evident that he would be considered as a purchaser, with notice of the equitable title vested in the heirs at law of the deceased Meador. Such of them as are minors, could contest the complainant's right to the land after they became of age; and consequently it would be unjust to compel him to receive a title which may be disputed.

Our conclusion then is this: that as the lands were acquired by the testator in 1835, the will executed in 1833 was inoperative, either to pass the lands, or to subject them to the operation of a power; that the title of the testator to these lands descended to his heirs at law, in whom it yet remains; and that the sale by the defendants, although made in the utmost good faith, can not have the effect to pass any title to the complainant, and that he is not required to receive that which is tendered to him on payment of his note. We are satisfied that the decree of the chancellor, so far as the merits of the case are concerned, is free from error.

It is unimportant to consider the effect of the exception to the depositions, because, in our view, they are laid aside entirely, inasmuch as the whole equity of the bill is admitted by the answers. In relation to the point, that the complainant had an ample and complete defense at law, we think the circumstance that the bond to make titles, which was executed by one of the defendants, withdraws this case from the influence of the decision made in *Wiley v. White*, 2 Stew. & P. 355;² and we are not, therefore, called on to decide, whether the circumstances of this case did not of themselves require the complainant to go into chancery to obtain a rescission of the contract.

Let the decree of the chancellor be affirmed.

1. *Langford v. Pitt*, 2 P. Wms. 629.

2. 3 Stew. & P. 355.

SHACKLEFORD v. WARD.

[3 ALABAMA, 37.]

NOTICE TO A STAKEHOLDER BY ONE OF THE PARTIES TO A WAGER, to retain the money deposited in his hands, arrests it, and he may not afterwards pay over the money to either, whatever the determination of the event upon which depends the wager.

SPECIAL DEMAND ON A STAKEHOLDER IS NOT NECESSARY, before instituting suit to recover the money deposited, if he has informed the depositor that he has paid over the money, which it is sought to recover, to the other party to the wager, in opposition to instructions previously given.

ASSUMPSIT. In 1839 plaintiff in error wagered with one Tankersley the sum of five hundred and fifty dollars, upon the result of the pending senatorial election. In the election that afterwards took place, the candidate against whom plaintiff bet, was returned. The validity of the election was, however, questioned, and the election was subsequently declared void and insufficient to entitle the candidate returned to a seat in the senate. Plaintiff, having knowledge of the questions made as to the validity of the election, informed defendant in error, who was the stakeholder of the money wagered by Tankersley and himself, thereof, and requested him not to pay over the money. Defendant, in compliance with this instruction, did retain the money, but afterwards, upon being promised indemnity by Tankersley, paid over the money, and informed plaintiff of his action. Plaintiff contended that this action on the part of defendant relieved him from the necessity of a special demand before instituting suit. The court, however, held otherwise, and instructed the jury that a demand was necessary.

Peck, for the plaintiff in error.

Jones, *contra*.

GOLDTHWAITE, J. The plaintiff in this case, after the supposed determination of the wager, gave notice to the stakeholder to retain the money in his hands, and not to pay it over to the supposed winner. This arrested the money in his hands, and it could at any time after this have been reclaimed by the plaintiff, and the defendant would not have been authorized to withhold it, even if the wager had been decided against the former. This was settled in the case of *Wood v. Duncan*, 9 Port. 227. It appears, however, that the event on which the wager was to be determined, in point of law, never took place, for the bill of exceptions shows that the election was declared to be void, and a new one ordered. The consequence of this decision was, to

remit the parties to this wager, to all their original rights to the moneys severally deposited by them. If the money had then remained with the stakeholder, a special demand would have been necessary to entitle the plaintiff to recover it.

2. No special demand, however, was necessary under the circumstances of this case. It appears that doubts had arisen with respect to the validity of the election, as declared in the first instance. The plaintiff informed the stakeholder that the election would be contested, and notified him not to pay the wager to the then supposed winner. Afterwards, and before the decision of the proper authority on the contested election, the stakeholder pays over the money to the supposed winner, and informs the plaintiff that he had done so, and that the then supposed winner would indemnify him for all losses. Certainly, after this, a demand was entirely unnecessary to enable the plaintiff to maintain his action, whether he elected to consider the wager as illegal and at an end; or whether he awaited the final decision, which in effect, decided that the wager was neither lost nor won. The latter course was pursued, and this action was commenced in February, 1840, the decision having been made a few days previously. The defendant, by his own act, in paying over the money, must be considered as waiving any right to a special demand. In the case of *Rathbun v. Ingalls*, 7 Wend. 320, it is said that an intention formed by an agent to retain money, and communicated to others, but not to the plaintiff, would not dispense with a demand. But it is admitted in that case, if the intention had been communicated to the plaintiff, it would have waived the demand. The county court erred in instructing the jury that the plaintiff could not recover without proof of a special demand of the money.

Let the judgment be reversed, and the cause remanded.

See *Jeffrey v. Ficklin*, post.

COOK v. FIELD.

[3 ALABAMA, 53.]

GENERAL ISSUE IN ASSUMPSIT WILL LET IN PROOF OF A PREVIOUS GARNISHMENT by which the debt now sued for was recovered from defendant.

PAROL EVIDENCE IS ADMISSIBLE TO IDENTIFY THE DEBT recovered by judgment against the defendant as garnishee with that sued upon, if the identification does not appear upon the face of the record.

JUDGMENT AGAINST A GARNISHEE IS NOT A DEFENSE when sued by his original creditor, unless the judgment has been satisfied.

PAYMENT BY ONE OF SEVERAL JOINT DEBTORS operates in favor of all.

ASSUMPSIT. The present plaintiff in error was the administrator of the original plaintiff, F. C. Ellis. The action was instituted by Ellis as assignee of a note executed to S. C. Fisher by defendants in error, and one Henderson, as to whom the suit was discontinued. Two pleas were pleaded: One, the general issue; the other, a special plea, relying upon a recovery against defendant Field, of this debt, by judgment of the circuit court of the United States, wherein he had been summoned as garnishee, by certain judgment creditors of S. C. Fisher, the assignor of plaintiff's intestate. To this plea the plaintiffs put in a rejoinder of *nul tiel record*. The case was tried before a jury. Parol evidence was introduced by defendants to show that the debt upon which judgment was obtained against Field as garnishee was the same as that now sued upon. To this evidence plaintiff interposed an objection, which was overruled. The jury was instructed that they must find for defendants, if they were satisfied that the judgment against Field, as garnishee, was for the debt now sued upon. The defendants had verdict. The other facts of the case appear from the opinion. Plaintiff assigned for error the failure of the court to dispose of the issue of *nul tiel record*, and also other matters which appear from the opinion.

Hale, for the plaintiff in error.

B. F. Porter, contra.

ORMOND, J. A recovery of the debt sued for by a previous garnishment, may be either pleaded specially, or given in evidence under the general issue, in an action of assumpsit; it is unnecessary, therefore, to consider in this case whether the objection, that the court, and not the jury, should have tried the issue under the plea of *nul tiel record*, is well taken, as the matter was submitted to the jury under the plea of *non assumpsit*. The defendants having produced the record of the judgment against Field, one of the defendants, who had been summoned as a garnishee, at the instance of a judgment creditor of the assignor of the plaintiff's intestate, and proved that it was for the same debt now sued on, the court charged the jury that if they were satisfied from the evidence that there was a judgment against the defendant Field, for the debt sued on, they must find a verdict for the defendants; to which the plaintiff ex-

cepted, and had previously objected to the evidence going to the jury. It becomes, therefore, necessary to consider whether the record offered, and the accompanying parol evidence, were sufficient to authorize a recovery for the defendants. The judgment against the garnishee was rendered *nisi*, for failing to appear in obedience to the process; and afterwards, upon the return of a *scire facias*, made final: it does not therefore appear from the record, that the judgment against the garnishee was for the same debt sought to be recovered in this action. There can be no doubt that it was competent for the defendants, by parol proof, to identify the debt recovered by the judgment against the garnishee, and show that it was founded on the same indebtedness attempted to be enforced in this suit.

It does not appear from the record of the garnishment, that an execution had issued upon the judgment against the garnishee, or that there was any proof to that effect, or that the judgment was satisfied. That the judgment against the garnishee unexecuted, will not protect the garnishee when sued by his creditor for the same debt, is clear, both on principle and authority; for if an unexecuted judgment against the garnishee would be a bar to a suit against him by the original creditor, it might happen that he would not be compelled to pay the debt at all, as the judgment of the attaching creditor might never be enforced. In the case of *Roberthson and Wife v. Norroy*, 1 Dyer, 83, a, the custom of London was certified by the recorder to be "that if a man sue another before the mayor, etc., and a third person is indebted to the plaintiff, inasmuch as the suit of the plaintiff is for, and by the custom of the law of attachment, the third person is condemned, and judgment given against him; notwithstanding the judgment, if no execution be sued out against the third person, the plaintiff may resort back to have judgment and execution against the defendant who is his principal debtor, and he may also sue the third person for his debt, notwithstanding the judgment unexecuted," etc. In *Turbill's case*, 1 Saund. 67, the custom was certified by the recorder, who describes the manner of summoning one as garnishee, etc., and concludes by saying: "And judgment shall be, that the plaintiff shall have judgment against him (the garnishee), and that he shall be quit against the other (the original creditor) after execution sued out by the plaintiff." To the same effect, and nearly in the same language, the law is laid down in 2 Bac. Abr. 262, tit. Customs of London.

From these authorities, it appears very clear, that the plaint-

iff in attachment, by the custom of London, may, after obtaining judgment against the garnishee, omit to sue out execution, and proceed against the original debtor, in which event the defendant in attachment may proceed against the garnishee for his debt, and the unexecuted judgment will be no bar to his recovery. The suing out execution against the garnishee is, in effect, an election to take him for the debt of the original debtor, and operates an extinguishment of the debt. The custom of London is the original of our statutory proceedings by attachment, with some slight modifications—one of which is, the plaintiff in attachment can not have judgment against the garnishee until he obtains judgment against the defendant in attachment; whereas, by the custom of London, the plaintiff, by making oath to his debt, and giving pledges to return the money in a year and a day, if the defendant disproved the debt, obtained judgment against the garnishee. As, therefore, by our attachment laid, the plaintiff obtains a judgment against the defendant in attachment, as well as against the garnishee, on both of which he may have execution, it will follow that the mere suing out an execution against the garnishee, will not, in this state, as in England, by the custom of London, be evidence of an election to substitute the garnishee as his debtor, instead of the defendant in attachment; and it will necessarily follow, that nothing but a satisfaction of the judgment against the garnishee, will absolve him from liability when sued for the debt by the original creditor. The court, therefore, erred, in stating that the rendition of judgment alone would have that effect.

The defense set up that the debt was paid by the garnishment of one of the defendants, would, if properly made out, be a defense to all. The statute, which declares that all joint contracts shall be considered as joint and several, does not affect this question. Although, by virtue of that statute, each of the makers of a note or bond may be sued separately, and several judgments obtained, there can be but one satisfaction, so a payment by one would be a payment for all, and the defense here set up, is nothing less than a compulsory payment of the debt by one of the defendants, which must inure to the benefit of all.

Let the judgment be reversed, and the cause remanded.

EVIDENCE EXTRINSIC THE RECORD inadmissible to show what matters included within the issues were passed upon in a former action: See *Gardner v. Buckbee*, 15 Am. Dec. 256.

FAILURE TO PLEAD ESTOPPEL where opportunity is offered, effect of: See *Wood v. Jackson*, 22 Am. Dec. 603, and note.

HITT v. LACEY.

[3 ALABAMA, 104.]

DEBT ON WHICH SUIT HAS BEEN INSTITUTED MAY BE ATTACHED in a proceeding prosecuted in the same court.

COSTS, WHEN THERE IS A PLEA PUIS DARREIN CONTINUANCE, which sets forth a true and valid defense, are to be adjudged to plaintiff to the time of plea pleaded.

DEBT. A plea to the action *puis darrein continuance*, set forth that subsequently to the institution of the action, defendant was garnished in an action instituted by one Howe against plaintiff, and that such proceedings were had in that action that judgment was finally recovered against plaintiff, and also against defendant as garnishee, for the amount of the debt now sued upon, and that defendant had paid and satisfied the judgment against himself. Upon demurrer to the plea, the court gave judgment for defendant and against plaintiff for costs. The plaintiff prosecuted a writ of error.

Peck and Clark, for the plaintiff in error.

Moody, contra.

ORMOND, J. We can not perceive any reason why an attachment will not be sustained, merely because the defendant in the attachment has commenced a suit against his debtor previous to the suing out of the attachment and the summons of his debtor as garnishee. Our statute authorizes an attachment to be levied on a debt due the defendant in attachment, and by a garnishment against such debtor, subjects the debt in his hands to the payment of the claim prosecuted in the attachment. It certainly is not the less a debt, because a suit has been commenced upon it, and therefore would seem to be within the very letter of the statute.

The case cited from 13 Peters is not like this case. There, the suit against the debtor, who was afterwards garnished, was commenced in a court of the United States, previous to the commencement of the suit by attachment in one of the state courts. This appears to have been a principal element of the decision of the court. It is stated in the judgment of the court that, "The jurisdiction of the district court of the United States, and the right of the plaintiff to prosecute his suit in that court, having attached, that right could not be arrested, or taken away by any proceedings in another court. This would produce a collision in the jurisdiction of courts, that would extremely embarrass the administration of justice." Now, here the suit

brought by the defendant in the attachment against his debtor, and the attachment against him, are both prosecuted in the same court; no conflict of jurisdiction, therefore, can by possibility arise, and no reason can, in our opinion, exist, which would justify the court in refusing to give effect to the statute. The precise point here raised, was determined by the supreme court of Pennsylvania, in *McCarty v. Emlin*, 2 Yeates, 190, in which it was held that a debt in suit might be attached in the hands of the defendants in the suit; McKean, C. J., saying that the English decisions in which the contrary doctrine was held, proceeded on the ground that the inferior courts, in which alone this proceeding could commence by the custom of London, could not interfere with a matter in suit in the king's superior courts. In *Zurcher v. Magee*,¹ decided at the last term, we held that money collected on a judgment, could not be attached by process of garnishment, in the hands of the sheriff, on the ground that it was in the custody of the law and did not become the property of the judgment creditor until it was paid over to him. It is obvious that decision does not affect the present question; and we are of opinion that no obstacle exists to giving effect to the plain direction of the statute.

But, as the plaintiff had a right of action when he commenced his suit, and which is admitted by the plea, *pais darrein continuance*, no judgment could be rendered against him for costs. The judgment of the court below must therefore, so far as it relates to the costs, be reversed, and here rendered for the plaintiff in error, up to the time of plea pleaded.

GOLDTHWAITE, J. I dissent from so much of the opinion just pronounced, as reverses the judgment, because costs were given to the defendant. I think the plaintiff was entitled to costs, only in the event of confessing the plea; here, however, he contests the defense, and I think all the precedents are, that he is chargeable with the costs.

MAYOR ETC. OF MOBILE v. YUILLE.

[3 ALABAMA, 137.]

LEGISLATURE MAY REGULATE THE MODE AND MANNER OF ENJOYING PROPERTY and regulate callings, where the public interests are affected, by general laws operating alike on all citizens.

ORDINANCE OF A MUNICIPAL CORPORATION IS NOT VOID as in restraint of trade, if it but relate to the regulation of the trade, and the regulation

is for the good of the inhabitants of the city, or for the advantage of the trade and improvement of the commodity sold.

IDEM.—THE LEGISLATURE MAY CONSTITUTIONALLY CONFER UPON A MUNICIPAL CORPORATION the power of regulating the assize of bread.

LEGISLATURE MAY CONFER UPON A MUNICIPAL CORPORATION the power to pass any by-law or ordinance which is not unreasonable or opposed to the general law of the state.

POWER TO PASS A BY-LAW CARRIES AS AN INCIDENT the power to enforce its observance by some reasonable penalty; what is a reasonable penalty is to be determined by a consideration of the offense prohibited.

PECUNIARY PENALTY FOR THE VIOLATION OF A MUNICIPAL ORDINANCE must be for a sum certain; it will not remove the objection that the ordinance fixes a sum beyond which the fine can not extend.

ERROR to the county court of Mobile. Defendant was convicted in the recorder's court of Mobile of violating the ordinance regulating the assize of bread, and was fined twenty dollars. The ordinance in question provided that no person should engage in the business of a baker in the city of Mobile without a license, to obtain which a payment of twenty dollars was required, as also a payment of one dollar to the clerk as his fee for issuing the same. An infraction of this provision was made punishable by fine not exceeding fifty dollars. The ordinance further provided that all bread baked should be of good and wholesome flour, and that its weight and price should be in conformity with a proclamation, to be issued from time to time by the mayor, regulating these matters by a reference to the price of flour at the time of the proclamation. If bread was, upon inspection by the police, found deficient in either quality or quantity, it was to be seized, condemned to the poor, and the offender was to be punished by fine not exceeding fifty dollars. Defendant appealed from the judgment in the recorder's court to the county court; that court reversed the judgment; whereupon the city prosecuted a writ of error to this court.

Campbell, for the plaintiff in error.

B. F. Porter, contra.

ORMOND, J. The question presented on the record is, whether the corporation of the city of Mobile had authority to pass the ordinance regulating the assize of bread. The power to make by-laws is incident to every corporation, and it is therefore unnecessary to confer the power by express grant in the charter. If the validity of a by-law is questioned, the test is whether it is reasonable and consonant to the general law of the state. By an act of the legislature, passed seventeenth of December, 1819, the inhabitants of the city of Mobile were incorporated. The

seventh section confers the power to make all necessary police regulations, and to pass all by-laws necessary for the government of the city; "to license bakers and regulate the weight and price of bread, and prohibit the baking for sale except by those licensed:" Toulm. Dig. 787. The question then is, whether the legislature had power to authorize the corporation to make such a by-law, and whether the power so conferred has been pursued.

It is strenuously contended by the counsel for the defendant in error, that no such power exists, because, as he contends, it would interfere with the right of the citizen to pursue his lawful trade or calling in the mode his judgment might dictate. Doubtless, under the form of government, which exists in this and the other states of this union, the enjoyment of all the rights of property, and the utmost freedom of action which may consist with the public welfare, is guaranteed to every man, and no restraint can be lawfully imposed by the legislature in relation thereto, which the paramount claims of the community do not demand, or which does not operate alike on all. Free government does not imply unrestrained liberty on the part of the citizen, but the privilege of being governed by laws, which operate alike on all. It is not, therefore, to be supposed, that in any country, however free, individual action can not be restrained, or the mode, or manner of enjoying property, regulated. The decision of this court, in *Matter of J. L. Dorsey*, 7 Port. 295, has been referred to, as sustaining the position that the act is unconstitutional. But the ground upon which the law in that case was held to be void, was not that the legislature could not regulate the matter and provide for the licensing attorneys at law, but because the act was partial, and did not operate alike on all the citizens of the state. Thus, Judge Goldthwaite holds this language: "As the constitution is silent with respect to the pursuits of business or pleasure, the general assembly has the power to prescribe any qualification not inconsistent with the rule that equality of right must be preserved. In other words, that any citizen may lawfully do what is permitted to any other. It rests with the legislative power, to prescribe the conditions on which any avocation or calling shall be pursued, so that the door is closed to none; and there seems to be no other limit to their discretion, than the one which arises from the first section of the bill of rights referred to:" Id. 361, 362.

There is no motive, however, for this interference on the part of the legislature with the lawful actions of individuals or the

mode in which private property shall be enjoyed, unless such calling affects the public interest, or private property is employed in a manner which directly affects the body of the people. Upon this principle, in this state, tavern-keepers are licensed and required to enter into bond, with surety, that they will provide suitable food and lodging for their guests, and stabling and provender for their horses; and the county court is required, at least once a year to settle the rates of innkeepers. Upon the same principle, is founded the control which the legislature has always exercised in the establishment and regulation of mills, ferries, bridges, turnpike roads, and other kindred subjects. So, also, all quarantine and other sanitary regulations, all laws requiring houses to be built in cities of a certain material, to guard against fire, depend for their validity on the same principle.

It has been strongly urged that this by-law is in restraint of trade, and therefore void by the common law. A contract of an individual, not to exercise a particular trade or calling in the kingdom, is void, but if on sufficient consideration, is good, if confined to a particular place; so a by-law restraining trade generally, is bad, but if made for the regulation of trade in a particular place, is good. For proof of which, a number of instances are given by Chief Baron Comyn, in his digest, 2d vol., 286, by-law B. 3, and among them is, "that such a baker bake white bread only, such an one brown." The rule and the reason of it, are laid down with great perspicuity in the great case of *Mitchel v. Reynolds*, 2 P. Wms. 181,¹ by Lord Maccolesfield. "All by-laws made to cramp trade in general, are void. By-laws made to restrain trade, in order to the better government of it, are good in some cases, viz.: if they are for the benefit of the place, and to avoid public inconveniences, nuisances, etc., or for the advantage of the trade and improvement of the commodity." The learned judge afterwards shows that this modified restraint is consistent with Magna Charta. See also the following cases in which such regulations have been held good: *Fugakerly v. Wellsham*,² 1 Stra. 463; *King v. The Chamberlain of London*, 3 Burr. 1322; *Wannel v. Chamberlain of the City of London*, 1 Stra. 675; *Pierce v. Bartrum*, Cowp. 269; *The Master Wardens etc. v. Fell*, Willes, 384. The sum of these authorities is that though there can be no general restraint of trade, yet to a certain extent it may be regulated, and by consequence to some extent restrained in a particular place, if such restraint be for the

1. 1 P. Wms. 181.

2. *Fugakerly v. Wellsham*.

good of the inhabitants, as when for the prevention of nuisances, certain trades are confined to the suburbs of a city, or where it is for the advantage of the trade and improvement of the commodity.

The regulation in this case seems to combine all these qualities. Where a great number of persons are collected together in a town or city, a regular supply of wholesome bread is a matter of the utmost importance; and whatever doubts may have been thrown over the question by the theories of political economists, it would seem that experience has shown that this great end is better secured by licensing a sufficient number of bakers and by an assize of bread, than by leaving it to the voluntary acts of individuals. By this means a constant supply is obtained without that fluctuation in quantity which would be the inevitable result of throwing the trade entirely open, and the consequent rise in price, when from accident or design a sufficient supply was not produced. The interest of the city in always having an abundant supply will be a sufficient guaranty against any abuse of the right to regulate the weight, the consequence of which would be to drive the baker from the trade.

The case of *Dunham and Daniels v. The Village of Rochester*, 5 Cow. 462, was considered by the counsel for the defendant in error as conclusive in his favor. The by-law of the town of Rochester, which was called in question in that case, assessed a tax of from five to thirty dollars for a license from all grocers, hucksters, etc., and imposed a penalty for selling without such license. The action was for the penalty for selling without license. The charter of the town authorized the trustees, etc., "To make all such prudential by-laws, rules, and regulations as they from time to time may deem meet and proper, and particularly such as are relative to the public market, etc., relative to taverns, gin-shops, and huckster-shops in said village." The court held this by-law to be bad on the ground that the authority of the corporation was not to pass what laws they pleased, but such as were prudential. The court say: "Admitting the power to limit or prohibit altogether, the erection of huckster or gin-shops, if required by prudence for the good of the corporation, it is not shown how they could be an evil if conducted under proper regulations, nor can we see judicially, that any restriction was necessary. For all the purposes of jurisdiction, corporations are like the inferior courts, and must show the power given them in every case." It appears from these extracts, very conclusively, that the decision of the court pro-

ceeded on the ground, that the by-law in question was void from an excess of authority—that it did not judicially appear that it was a prudential regulation. But in this case, the power is expressly given by the statute to do the act complained of, and in the case just cited from 5 Cowen, it appears that the trustees of the town of Rochester, were authorized by the act of incorporation, to pass by-laws regulating the assize of bread; and are prohibited from fixing the price of any commodity or articles of provision, except the article of bread, that may be offered for sale.

The legislature having full power to pass such laws as are deemed necessary for the public good, their acts can not be impeached on the ground, that they are unwise, or not in accordance with just and enlightened views of political economy, as understood at the present day. The laws against usury, and quarantine, and other sanitary regulations, are by many considered as most vexatious and improper restraints on trade and commerce, but so long as they remain in force, must be enforced by courts of justice; arguments against their policy must be addressed to the legislative department of the government. If, however, such an inquiry were open, it would be very difficult to satisfy this court, that the assize of bread in a populous city or town, is an unwise regulation. The practice has prevailed too long, and has been too generally, not to say, almost universally acquiesced in, and continued, to permit us to doubt, that some regulation on this interesting subject is necessary and proper. It is also insisted, that admitting the legislature to possess the power, it can not be delegated to a corporation. We have seen that the mere creation of a corporation, carries with it the power to make all by-laws, which are reasonable and not contrary to the general law of the state; it is also true, that an express grant to pass an unreasonable or unlawful by-law, is void; it follows, therefore, most conclusively, that the legislature may grant expressly the power to do that which the corporation might do without express grant; the test of the by-law being the same in either case: Willcock on Corp. 96. As, however, by-laws are the rules of action which the inhabitants of a place prescribe for their own government, there is a peculiar propriety in permitting them to be the judges of what rules are necessary and proper, and such is the constant, the invariable practice.

Finally, it is urged, that there is no power given by the act of incorporation, to inflict a penalty for the violation of the by-

law. The right to make laws, necessarily implies the power of enforcing the law by some sanction, otherwise the power would be nugatory. The supreme legislative power of a state, are the exclusive judges of the penal sanction of a law, but the penalty for the violation of a by-law, must, like the by-law itself, be reasonable. The penalty in this ordinance under consideration, is not more than fifty dollars, to be recovered before the mayor, or any one of the aldermen; one half to the use of the city, and the other to the use of the person procuring the conviction.

What would be a reasonable penalty, can not, from the nature of the thing, admit of a general rule, applicable to all cases, but must, in every case, be determined by the nature of the offense intended to be prohibited. Some general rules, however, may be laid down as applicable to all cases. The penalty must be a sum certain, and can not be left to the arbitrary assessment of the corporation court, to be determined according to the nature of the offense. It is also said, that although the utmost limit of the penalty be fixed beyond which the fine can not extend, that it does remove the objection. The reason assigned is, that it permits the corporation to be a judge in its own cause. Nor, it is said, can the penalty of a by-law extend to forfeiture of goods, unless such power be expressly given by the charter: See the cases collected by Angell & Ames on Corporations, 200; and by Willcock on Municipal Corporations, 152, sec. 308. The by-law in this case being not for a sum certain, but for such sum not exceeding fifty dollars, as the corporation court might think proper to impose as a fine, can not be supported. We also incline to doubt the propriety of that portion of the by-law which forfeits such bread as is not of the weight required by the ordinance, as also that portion which requires twenty dollars to be paid by the baker as a license, unless the latter can be supported under the taxing power of the corporation. Though doubtless the corporation could require a fee for the issuance and registration of the license.

From this view of the case, it follows that the county court did not err in its judgment reversing the judgment of the recorder, and it is therefore affirmed.

CASES
IN THE
SUPREME COURT
OF
ARKANSAS.

DOE EX DEM. PHILLIPS' HEIRS v. PORTER.

[3 ARKANSAS, 18.]

WHERE THE DESCRIPTIONS OF A CONVEYANCE CONFLICT, that which has the greater certainty must prevail.

IDEM.—QUANTITY GIVES WAY TO BOUNDARIES in case of conflict.

IDEM.—A PARTICULAR DESCRIPTION WILL CONTROL a general description of the same tract.

RECITAL OF ONE DEED IN ANOTHER binds the parties and those claiming under them by estoppel. Thus if a conveyance purport to be of land conveyed by a prior deed to which reference is made, the grantees can not contend that more passed than was included in the recited deed.

EJECTMENT. The contest was between the heirs of Phillips and purchasers from Kendrick and Fisher, Phillips' immediate grantees. The case was submitted upon an agreed statement of facts, wherefrom it appeared that the tract in controversy embraced three and eighty-two one hundredths acres in surface area of a tract of six hundred and forty acres, patented by the general government to William Russell in 1824. About two hundred and seventy-five acres of this tract was laid off by Russell for the site of the town of Helena. Immediately in front of said town site and bordering on the Mississippi river, but not included in the town, were three fractions of land, which may be referred to as fractions A, B, and C. Fraction C was that in controversy. Various conveyances were made by Russell to Phillips at different times, of his interest in portions of the tract originally patented to him. In particular by deed of July 13, 1825, acknowledged August 13, of the same year, Russell conveyed to Phillips the western three hundred and forty acres

of the tract, a large number of town lots, and fraction A, containing eighteen acres; and by deed of August 1, 1825, acknowledged August 13, 1825, he conveyed to Phillips, besides certain town lots, fraction C, that now in controversy. The acreage of fractions A, B, and C, together with the three hundred and forty acres which had been conveyed to Phillips as above mentioned, amounted to three hundred and sixty-six and eighty-two one hundredth acres. October 1, 1830, the ownership of all these parcels of land was centered in Phillips. Upon that day he executed to Kendrick and Fisher a deed, the nature of which appears from the opinion. The defendants claimed under Kendrick and Phillips, and contended that under a proper construction of the deed last mentioned, reference being had to the surrounding circumstances, fraction C would be covered by it. The jury were instructed in accordance with this view of the law and found for defendants; whereupon plaintiffs moved for a new trial, and took this appeal from an order denying their motion.

Trapnall and Cocke, for the plaintiffs in error.

Pike, *contra*.

By Court, LACY, J. The question now submitted for adjudication lies within a very narrow compass. It is, nevertheless, a question of considerable magnitude and interest, and one of no ordinary difficulty. Here we have given to the whole subject, and to every part of it, a most patient and full investigation. Both parties claim title to the land in controversy, under Sylvanus Phillips; the lessors of the plaintiff, as his legal heirs and representatives; the defendant in the action, as a purchaser, for a valuable consideration, from his immediate grantees. The law was adjudged below in favor of the appellee upon an agreed case. That judgment is now brought before the court by appeal for revision and correction.

The whole case turns upon the construction of the deed from Sylvanus Phillips to Austin Kendrick and Arnold Fisher, bearing date the first day of October, 1830; and the question now to be decided is, what number of acres does that deed convey? The deed embraces a great variety of clauses, conveying different tracts of land, and it uses the same terms of description and limitation in regard to them all. It first states the number of acres contained in each tract, and it afterwards refers to and recites the particular patent and grant under which Phillips derived title. The words of the deed are: "The party of the first

part have granted, bargained, and sold, and by these presents do grant, bargain, and sell unto the party of the second part, and to their heirs and assigns forever, the following described tract, containing three hundred and sixty-six acres of land, being part of a six hundred and forty acre tract originally owned by Patrick Cassidy, and confirmed to William Russell under Patrick Cassidy, and patented by the president of the United States to William Russell and his heirs on the twenty-sixth day of March, 1824, which said tract of land was conveyed by William Russell to Sylvanus Phillips by deed bearing date the thirteenth day of July, 1825, situate in the county of Phillips and territory of Arkansas, adjacent the town of Helena."

It is conceded on all hands that the true construction of this deed will determine the rights of the parties to this suit. If the deed conveys three hundred and sixty-six acres to the grantee, then the law arising upon the agreed case is unquestionably for the defendant. But on the contrary, if it only conveys three hundred and fifty-eight acres of land, the exact quantity or number of acres included in Russell's deed to Phillips of the thirteenth of July, A. D. 1825, then it is evident that the lessors of the plaintiff are entitled to a recovery of the premises in question. The construction of the grant above quoted has been discussed with much ability and learning by the respective counsel engaged in the cause, and we have derived no inconsiderable aid and assistance in the formation of our opinion from their logical and demonstrative arguments. In the construction of deeds, says Lord Mansfield, the rules applicable to such instruments are accurately laid down and defined by all the authorities; and they rest for their foundation and support upon reason, justice, law, and common sense. We shall, in the present instance, only state a few of them, and such as we deem to have a direct bearing on the case under consideration.

1. All deeds shall be construed favorably and as near the intention of the parties as possible, consistent with the rules of law: 4 Cru. Dig. 202; *Bridge v. Wellington*, 1 Mass. 219; *Worthington et al. v. Hylyer et al.*, 4 Id. 202; *Ludlow v. Mayer*,¹ 3 Johns. 383; *Troop et al. v. Blodgett*,² 16 Id. 172. 2. The construction ought to be put on the entire deed and every part of it. For the whole deed ought to stand together, if practicable, and every sentence and word of

1. *Jackson as dem. Ludlow v. Myers*, 3 Johns. 388; S. C., 3 Am. Dec. 504.

2. *Jackson as dem. Troup v. Blodgett*.

it be made to operate and take effect: 4 Cru. Dig. 203, sec. 5, and authorities above cited; P. Wms. 497; Vaugh. 167. 3. If two clauses in a deed stand in irreconcilable contradiction to each other, the first clause shall prevail, and the latter shall be regarded as inoperative: 4 Cow. 248; Mard. 94; 6 Wood. 107; 4 Com. Dig., tit. Fait. 4. The law will construe that part of a deed to precede which ought to take precedence, no matter in what part of the instrument it may be found: 6 Rep. 38 b;¹ *Cromwell v. Crittenden*,² 1 Ld. Raym. 335; 10 Rep. 8; Bulst. 282. 5. All deeds shall be taken most strongly against the grantor. For the principle of self-interest will make men sufficiently careful not to prejudice themselves, or their rights, by using words or terms of too general or extensive a signification: 4 Com. Dig., tit. Fait; 4 Cru., p. 203, sec. 13; 8 Johns. 394;³ 16 Id. 172;⁴ *Adams v. Frothingham*, 3 Mass. 352 [3 Am. Dec. 151]; *Watson et al. v. Boylston*, 6 Id. 411.⁵ These rules are now regarded as maxims in the science of the law, and they are perfectly conclusive of the points to which they apply.

In all conveyances the grantor must describe the thing granted with sufficient certainty to ascertain its identity. And if he fails to do so, the grantee takes nothing, by reason of the uncertainty of the grant; for there being nothing for the deed to operate upon, of course nothing passes by it.

The most general and usual terms of description employed in deeds to ascertain the thing granted, are, first, quantity; second, course and distance; and third, artificial or natural objects and monuments. And whenever a question arises in regard to description, the law selects those terms or objects which are most certain and material; and they are declared to govern in the construction of the deed. Upon this principle it is held that quantity must yield to course and distance, and that course and distance must give way to artificial and natural objects. These plain and salutary principles are fully sustained by all the authorities, as a reference to them will fully show: *Williams v. Watts*,⁶ 6 Cranch, 148; *Shipp et al. v. Miller's Heirs*, 2 Wheat. 316; *Jackson v. Barringer*, 15 Johns. 471; *Powell v. Clark*, 5 Mass. 355 [4 Am. Dec. 67]; *Jackson v. Hubble*, 1 Cow. 617. In *Jackson v. Moore*, 6 Id. 717, it is declared that not only course and distance must yield to natural and artificial objects, but quantity, being the least part of description, must yield to boundaries or numbers, if

1. *Finch's case*.

2. *Cromwell v. Grimsden*.

3. *Jackson v. Gardner*.

4. *Jackson v. Blodget*.

5. 5 Mass. 411.

Vassie v. Watts.

they do not agree. And in *Mann v. Pearson*, 2 Johns. 40, and in *Jackson v. Barringer*, 15 Id. 472, it is laid down to be a well-settled rule, that where a piece of land is conveyed by metes and bounds, or any other certain description, that will control the quantity, although not correctly stated in the deed, be the same, more or less. And the example put by way of illustration is, that if a man lease to another all his meadows in D. and S., containing ten acres, when, in truth, they contain twenty acres, all shall pass: *Jackson v. Wilkinson*, 17 Id. 147. In *Powell v. Clark*, 5 Mass. 356 [4 Am. Dec. 67], the rule is thus stated: "In a conveyance of land by deed, in which the land is certainly bounded, it is very immaterial whether any or what quantity is expressed; for the description by the boundaries is conclusive." "And when the quantity is mentioned, in addition to a description of the boundaries, without any express covenant that the land contains that quantity, the whole must be considered as description."

It is a general rule, "if there are certain particulars once sufficiently ascertained, which designate the thing intended to be granted, the addition of a circumstance, false or mistaken, will not frustrate the grant." "But when the description of the estate intended to be conveyed includes several particulars, all of which are necessary to ascertain the estate to be conveyed, no estate will pass except such as will agree to every part of the description." Thus, if a man grant all his estate in his own occupation, and in the town L., no estate will pass, but what is in his own occupation and in that particular town. The description of the tenements granted must, in such a case, comprehend all the several particulars and circumstances named, otherwise the grant will be void: 4 Com. Dig., Fait, R. 3; *Doughty's case*;¹ *Jackson v. Clark*, 7 Johns. 223; *Blange v. Gould*,² Cro. Car. 447, 473; *Jackson v. Loomis*, 18 Johns. 84. But if the thing described is sufficiently ascertained, it shall pass, though all the particular descriptions be not true. For example, if a man convey his house in D., which was in the possession of R. C., when in truth and in fact it was in the occupation of P. C., the grant nevertheless shall be good: *Roe v. Vaumer*,³ 5 East, 51. For it was sufficiently described by declaring that it was in the town of D.: Hob. 171;⁴ Bro. Abr., Grants, 92. Where there is error in the principal description of the thing intended to be granted, though there be no error in the addition, nothing will

1. 8 Co. 9.2. *Blague v. Gold*.3. *Roe v. Vernon*.4. *Stukely v. Butler*.

pass. Thus, says Lord Bacon, "if a person grants *tenementum suum* or *omnia tenementa sua* in the parish of St. B. without Oldgate, when, in truth, it is without Bishopgate, *tenura Gulielmi*, A., which is true, yet the grant will be void, because, that which sounds in denomination is false, which is the more worthy, and that which sounds in addition is true, which is the less. And though the words in *tenura Gulielmi* A., which is true, had been first placed, yet it had been all one:" 3 Rep. 9;¹ *Stukeley v. Butler*, Hob. 171; *Doddington's case*,² Co. Lit. 2, 32, 33.

Where lands are first described generally, and afterwards a particular description added, that will restrain and limit the general description. Thus, if a man grants all his lands in D., which he has by the gift and feoffment of J. S., nothing will pass, but the lands of the gift and feoffment of J. S.: 4 Com. Dig. 287; 4 Cru. 325; 1 Johns. Ch. 210;³ 4 Cru. 225; Com. Dig., Parole, A, 23; *Bott v. Burnell*, 11 Mass. 167; *Worthington v. Hylyer*, 4 Id. 205.

We will now proceed to construe the deed of Phillips to Kendrick and Fisher according to the principles here laid down and established. The deed does not create either an express or an implied covenant to convey an exact quantity of acres mentioned in the first clause of the sentence, unless the terms "one other tract of land containing three hundred and sixty-six acres," constitute such an agreement. Had the deed stopped here, there can be but little doubt that the grantor would have sold, and the grantees have taken the exact number of acres as designated by these general terms. This it has not done, but it proceeds to add other words of greater certainty, and of more particular description, limiting and restricting their general meaning. The grant declares the premises sold to be the "said tract of land which was conveyed by William Russell to Sylvanus Phillips, by deed bearing date the thirteenth of July, 1825." Then the land sold and conveyed to Kendrick and Fisher is the same identical tract purchased by Phillips from Russell by deed bearing date thirteenth of July, A. D. 1825. Here, then, the land is first described by quantity, and afterwards by boundary. That being the fact, the deed in question falls precisely within the rule—that the quantity must yield to the boundary—because the latter description contains greater certainty and materiality. Again, a particular description can not be limited by general expressions. In the present instance, there is a general descrip-

1. *Downtie's case*.

2. 2 Co. 33.

3. *Nicoll v. Huntington*, 1 Johns. Ch. 165.

tion, and then follows a particular description of the thing conveyed; and where that is the case, and the two descriptions contradict each other, the particular description shall prevail. No one can doubt but that Russell's deed furnishes a more accurate and particular description of the land conveyed than the simple affirmation that the tract contains three hundred and sixty-six acres. Both parties fixed and agreed upon the metes and bounds of Russell's deed for the purpose of ascertaining the exact number of acres conveyed. For if this was not the case, why did they refer to that deed, and recite it in the grant? By incorporating it into their agreement, they made it a part of their covenant, and constituted it the governing consideration of their contract. It is no answer to this argument to say that Russell's deed to Phillips lacked certainty in description, and therefore its recital in Phillips' deed to Kendrick and Fisher can not render that certain which is in itself vague and doubtful. It is true that the deed conveys three hundred and thirty-five town lots, a fraction of eighteen acres, and three hundred and forty acres. The deed recited contains sufficient certainty to ascertain the quantity conveyed. The town lots are specifically described, and so are the eighteen-acre tract and the three hundred and forty acre tract. How then can the deed be said to want certainty in description? The two tracts of eighteen acres and three hundred and forty acres do not amount to the three hundred and sixty-six acres, but only to three hundred and fifty-eight acres. Russell's deed therefore only conveys three hundred and fifty-eight acres, and that being the case, the fraction of three and eighty-two hundredths acres can not be included within the grant made by Phillips to Kendrick and Fisher of October 1, 1830.

The town lots mentioned in the deed recited are surely not embraced in the term "one other tract of land," for in no point of view can it be considered as falling within that description or denomination. It is surely not a legal consequence that because Phillips was the owner of the entire residue of the original tract of six hundred and forty acres, after deducting from it that portion out of which the town of Helena was formed, that therefore he intended to convey the whole of that residue to Kendrick and Fisher, neither does this position follow, or is strengthened by the fact that the two deeds of thirteenth of July and of first of August were recorded on the same day, to wit: on the thirteenth of August, A. D. 1825. Phillips' deed to Kendrick and Fisher, reciting Russell's deed to him, does not

refer to the recording of that deed, but to the day upon which it was executed. The tract of land conveyed is then definitely described and ascertained by Russell's deed. The grantor and grantees are presumed to know the exact quantity of land contained within the limits of Russell's deed, and they both relied upon the estimation therein expressed. The grantee paid the purchase money for the number of acres contained in that deed, and the grantor parted with the premises there conveyed, according to its metes and bounds.

In construing the deed from Phillips to Kendrick and Fisher the court is restricted to the grant itself. For it contains no ambiguity or uncertainty upon its face. The intention of the grantor must be collected from the face of the deed, and not from any other foreign or extraneous matter contradicting that deed. "The recital of one deed in another binds the parties and those claiming under them." Technically speaking, it operates as an estoppel, and binds parties and privies—privies in blood, privies in estate, and privies in law: 1 Ph. Ev. 411; Com. Dig., tit. Ev., B. 5; 1 Salk. 285;¹ *Jackson v. Carver*, 4 Pet. 83; 2 P. Wms. 482; Willes, 11;² 1 Dall. 67;³ *Van Hoesen v. Holley*, 9 Wend. 209. Here the grantor and grantee, and all claiming under either of them, are bound by the recital. This recited deed, then, fixes and ascertains definitely the precise quantity of land, or number of acres sold and conveyed by Phillips' deed bearing date first of October, A. D. 1830, to Kendrick and Fisher. That quantity consists of three hundred and fifty-eight acres and not three hundred and sixty-six acres; and this being the case, it necessarily follows, from the facts admitted of record, that fractional C, as marked in the diagram, containing three and eighty-two one hundredth acres, the land in dispute, was never sold and conveyed to Kendrick and Fisher, and consequently, they having no right to the premises, had no power or authority to pass the title of it to the tenant in possession. The maxim then, *caveat emptor*, expressly applies to his case, and he must look to his grantors for redress for the injury sustained.

The general terms used in Phillips' grant to Kendrick and Fisher are restrained and governed by the recital of Russell's deed of thirteenth of July, A. D. 1825. 1. Because the description by quantity contains mere words of explanation or addition, and constitutes the lowest degree of certainty in ascertaining the land granted. 2. Because the general terms used in the deed are afterwards

1. *Ford v. Gray*.2. *Shelley v. Wright*.3. *Morris v. Van Doren*.

restricted and limited by an enumeration of particulars that definitely described the exact number of acres conveyed. And lastly, because both the grantor and the grantees having recited another deed in the grant, they, and all claiming under them, are estopped from denying or questioning the conclusions or boundaries of the recited conveyance.

If the construction we have put upon the deed from Phillips to Kendrick and Fisher, of the thirteenth of July, A. D. 1825, be the true rule upon the subject, then it necessarily follows that the instructions given to the jury by the court below were evidently erroneous. Therefore its judgment must be reversed with costs, and a new trial awarded, and the cause remanded, to be proceeded in agreeably to the opinion here delivered.

WHERE DESCRIPTIONS IN A DEED CLASH, which are preferred: See *Styers v. McConnell*, 32 Am. Dec. 439, and note, in which are collected the prior decisions on the subject.

JEFFREY v. FICKLIN.

[3 ARKANSAS, 227.]

WAGERS UPON THE RESULT OF A PENDING ELECTION are contrary to public policy, and can not be enforced.

STAKEHOLDER OF MONEY WAGERED UPON THE RESULT OF AN ELECTION can not pay over the money lawfully, in opposition to the order of his principal; nor can he refuse to deliver up the wager if demanded before the determination of the final result of the election.

ACTION upon a sealed note. The action originated in a justice's court, whence it was appealed to the circuit court, which gave judgment for plaintiffs, present defendants in error. The note was given under the following circumstances: Jeffrey and Bagley, while in the store of Ficklin & Bennett, agreed to a wager upon the result of a pending election. For the purpose of carrying out the wager they executed to Ficklin & Bennett, each their sealed note for twenty-four dollars, and deposited them in the hands of Bennett. The notes were to represent the price of a saddle offered for sale by said Ficklin & Bennett, and upon the determination of the result of the election, Bennett was to deliver the saddle to Bagley, in case his candidate was elected, and to collect its price from Jeffrey; while the opposite course was to be pursued if the candidate of the latter were chosen. Before the result of the election was determined the parties to the wager agreed to rescind it, whereof the stakeholder was duly informed, and was notified by Jeffrey in partic-

ular not to deliver over the saddle under any circumstances, as the wager had been annulled, and he would not be held responsible for its price. Notwithstanding this notice Bennett delivered the saddle to Bagley, upon the result of the election determining adversely to the candidate supported by Jeffrey.

Trapnall and Cooke, for the plaintiff in error.

T. Johnson, contra.

By Court, DICKINSON, J. Wagers, contrary to public policy, that are immoral, or affect the feelings, interests, or characters of third persons, are contrary to sound policy, and are not recoverable in law. In a country where elections are frequent, and free, as in this, every means should be adopted to maintain them pure. Wagers operate on the passions, and influence the parties, by the strongest motives of pecuniary interest, to support, and induce others to vote for the same person. The freedom of choice and unbiased action is destroyed. The disposition to select men for their integrity and capacity, no longer exists. And the corrupting influence proceeding from this species of gambling is unfortunately felt, to a very great extent, by every class of society. The consequences resulting from it, are to be deeply deplored: and therefore it is, that the courts uniformly discountenance actions where they are founded in iniquity and injustice. Is the claim of the defendants in error of a character that will permit them to come into court with clean hands and pure consciences, and ask aid in the recovery of a claim for which no consideration has been received? All the parties to the record were *particeps criminis*. Bennett, the partner of Ficklin, as stakeholder of the notes, was cognizant that they were bet upon an election then pending; and though both parties had agreed, prior to the result, to rescind the wager and withdraw the notes, Bennett refused to deliver them up. And, notwithstanding Jeffrey notified him that he would not pay it, in any event, he retained possession, and, upon the result of the election, delivered the saddle to Bagley, the winner, and sued Jeffrey upon his note, which was for the payment of the saddle, and obtained judgment in the circuit court on appeal. Betting upon elections then pending, as calculated to endanger the peace and harmony of society, and to have a corrupting influence upon the public morals, has uniformly been considered as contrary to sound policy; and so it was decided in England, upon a wager on the election of a member to parliament: *Allen v. Hearn*, 1 T. R. 56. The whole doctrine is ably reviewed and sustained in the case of *Yates v. Foot*,

12 Johns. 1. As to the character in which the defendants in error stand, Comyn, in his treatise on contracts, 30, 46, says, that "it is a general rule, that if the contract be executed, and both parties *in pari delicto*, neither of them can recover, from the other, the moneys so paid; but if the contract continues, and the party is desirous of rescinding it, he may do so, and recover back the deposit." And this distinction is taken in the books, viz.: "Where the action is in affirmance of an illegal contract, for the performance of an engagement *malum in se*, it can in no case be maintained. But where the action is in disaffirmance of such a contract, and, instead of endeavoring to enforce it, presumes it to be void, and seeks to prevent the defendant from retaining the benefit which he derived from an unlawful act, then it is consonant to the spirit and policy of the law that he should recover." A stakeholder who pays over money bet upon an election, in opposition to the express notice and order of the better, must do so at his peril; nor can a stakeholder refuse to deliver up the wager, if demanded by the party, before the final result of the election. The contract was executory. The wager probably originated in hasty zeal and the impulse of passion, and when, on cool reflection, they were desirous of rescinding it, Bennett refused to return the stake, as, by law, he was bound to do. Having a knowledge of the whole transaction, and the consideration for which the note was given, the circuit court erred in giving judgment in favor of the plaintiff.

The judgment is reversed.

WAGERS UPON RESULT OF ELECTION INVALID: *Stoddard v. Martin*, 19 Am. Dec. 643; *Bunn v. Riker*, 4 Id. 392; *Rust v. Gott*, 18 Id. 497; *McCallister v. Hoffman*, 16 Id. 556.

FIELD v. DICKINSON.

[3 ARKANSAS, 409.]

TERM "BEYOND SEAS," IN THE STATUTE OF LIMITATIONS, means without the state.

ASSUMPT. The opinion states the case.

Ashley and Watkins, for the plaintiff in error.

Pike, contra.

By Court, DICKINSON, J. The demurrer to the rejoinder of the plaintiff below, raises the question, whether or not the statute of limitations will run against a party who has never come

within the limits of our state. The statute does not commence running until a complete cause of action has accrued, and this occurs when the debt or duty can be put in suit, and there is a party capable of suing. Whenever the statute commences running, it does not stop for any obstacle, but continues to run on. Statutes of limitations are municipal regulations founded upon local policy; and as they regard the remedy, and not the right of contract, they possess no binding power beyond the jurisdiction of the particular states or governments that enact them. As they do not enter into, or form any part of, the contract, the *lex fori*, and not the *lex loci*, applies in their interpretation. A foreign statute of limitations can not, therefore, be pleaded to a suit instituted here; and so it has been repeatedly ruled by all the English and American decisions. In the present case, both the plaintiff and defendant resided beyond the limits of the state when the contract was entered into. Since that time, the plaintiff in error has removed to this state, where he now resides; the defendant still continuing to be a citizen of Kentucky.

To the defendant's plea of the statute of limitations, the plaintiff replied, that he was saved from its operation, because he has always been a citizen of another state. This case arose under our territorial statute of limitations, but we apprehend the principle we are about to lay down will apply, with equal force, to the statute of limitations under our state government: *Steele & McCamp. Dig.*, p. 381, secs. 1, 2. The statute, after enumerating the class of cases in which it will run, and which embraces the cause of action now under consideration, contains, in express words, a saving in favor of infants, married women, persons of unsound mind, and persons residing beyond seas. These classes of persons the legislature saved from its operation, until after their disabilities should be removed.

The inquiry now is, what is the meaning of the term beyond seas? This proviso is not contained in the statute of 21 James, and in the case of *Dupleen v. De Rose*, 2 Vern. 154,¹ Lord Chief Justice Cowper remarks, "that it was plausible and reasonable that the statute of limitations should not take place, nor the six years be running, until the parties came within the cognizance of the laws of England, but that that must be left to the legislature." The term beyond seas first occurs in the proviso of the statute of Anne, from which our statute of limitations is derived. In England, the term meant persons who resided out of the realm, and, as such, they were de-

1. *Dupleen v. De Rose*, 2 Vern. 540.

clared to be beyond seas, whether they were either native-born citizens or foreigners. The expression beyond seas has received, in our country, a fixed and determined meaning. It is now well settled, that it applies to persons who are beyond the jurisdiction of the state; as well to foreigners who have never come within the jurisdiction, as to our own citizens who may be absent, and against whom the statute never commenced running.

The different members of our confederacy are regarded in the light of foreign governments, so far as their own municipal regulations are concerned; and therefore, the citizens of one state can not be barred by the statute of limitations of another state, unless they bring themselves within its jurisdiction; and so it has been repeatedly ruled by all the authorities: *Shelby v. Guy*, 11 Wheat. 361; *Bank of Alexandria v. Dyer*, 14 Pet. 141; *Stritfort v. Graeme*,¹ 3 Wils. 145; *Williams v. Jones*, 13 East, 449; *Hall v. Little*, 4 Mass. 203;² *Ruggles v. Keeler*, 3 Johns. 263, [3 Am. Dec. 482]; *Chonequa v. Mason and Brown*, 3 Gall. 342.³ The application of the principle here stated, clearly shows that the cause of action of the plaintiff below, is saved by the proviso of our statute, and consequently the defendant's rejoinder to the replication must be adjudged insufficient because it does not contain any matter that will defeat the cause of action.

The judgment of the court below, is therefore affirmed, with costs.

MEANING OF TERM "BEYOND SEA" in statute of limitations: See *Whitney v. Goddard*, 32 Am. Dec. 216, and note.

STATE v. HARRIS.

[3 ARKANSAS, 570.]

WRIT OF QUO WARRANTO IS A WRIT ISSUABLE by the state at will and of right, and is a demand made by it upon an individual, to show by what right he exercises a franchise, which can not lawfully be exercised, except by virtue of some grant or authority emanating from it.

ON QUO WARRANTO, THE BURDEN IS UPON THE DEFENDANT of showing such facts as invest him with a complete legal title to the franchise in question.

IDEM.—UPON A QUO WARRANTO TO THE PRESIDENT OF A CORPORATION, requiring him to show his title to that office, he must show the existence of the corporation, that he is possessed of the qualifications required by law of the incumbent of the office of president thereof, and that he is the president.

1. *Stritfort v. Graeme*.

2. 14 Mass. 203.

3. *Chonequa v. Mason*, 1 Gall. 342.

IN PLEADING CITIZENSHIP, an averment that defendant is a citizen of the state is sufficient.

QUO WARRANTO, OWNERSHIP OF LAND, HOW PLEADED.—Where the ownership of real estate is by law a prerequisite to the exercise of a franchise, upon *quo warranto*, the party exercising the franchise must in his plea describe the real estate of which he is owner, and how he has derived title thereto, and exhibit the deeds and records by which his ownership is evidenced.

IDEM.—**OWNERSHIP OF STOCK**, where a prerequisite to the exercise of a franchise, must be pleaded, so as to show that the stock was originally awarded after a compliance with the requirements of law, and if acquired by the defendant by transfer, the transfer must be set out; and the title deeds and records through which the defendant's title thereto has been acquired, must be exhibited, or some legal excuse for their non-production must be made.

IDEM.—**IN PLEADING AN ELECTION TO THE OFFICE OF DIRECTOR**, by the stockholders of a corporation, defendant must show that the election was held agreeably to law and in conformity with and in pursuance of the ordinances and regulations of the governing board of the corporation, and that at such election he received a majority of the legal votes cast; if his claim is by virtue of an election by the board of directors, to supply a vacancy therein, he must show the existence of a board competent to elect, and that a vacancy existed therein, and how such vacancy arose, and his subsequent election.

DEFENDANT IN QUO WARRANTO NEED ONLY SHOW A PRIMA FACIE LEGAL RIGHT to his enjoyment of the franchise; that if his pleading show an election by electors acting under color of legal right, it is sufficient; and that the electors were not possessed of the proper qualifications must be pleaded in avoidance by the state.

WHERE THE TRANSFER OF STOCK IS REQUIRED, by ordinance of the corporation, to be entered upon a transfer book, the transferees of the stock will not become stockholders prior to the entry on the transfer book.

QUO WARRANTO. The opinion states the case.

Ashley, for the state.

Fowler, contra.

By Court, RINGO, C. J. This is a writ of *quo warranto*, requiring the defendant to show by what warrant he exercises the office of president of the Real Estate bank of the state of Arkansas. The defendant appeared to the action, and filed a plea, setting forth the authority by virtue of which he claims the right to exercise said franchise; which, on demurrer thereto, was adjudged insufficient, and leave granted the defendant to answer over; whereupon, he filed three separate pleas to the action, each purporting to show a distinct authority for his exercising said office. To these pleas the plaintiff filed a demurrer, assigning therein specially numerous and various causes of demurrer. The

defendant joined in the demurrer; and the legal questions arising thereupon being argued by counsel, as well on behalf of the plaintiff as the defendant, were submitted to the court, and are thus presented for our consideration and decision. It will be remembered that the writ of *quo warranto*, which the state may issue at will and of right, is emphatically a demand made by the sovereign upon some individual, to show by what right he exercises some franchise appertaining to the former, which, according to the constitution and laws of the land, he can not legally exercise, except by virtue of some grant or authority from the sovereign; and that in such case, the law imposes upon the defendant the burden of showing such grant or authority as invests him with the legal right to such franchise. And therefore the defendant, in answering such demand of the state, unless he disclaim all right to the franchise in question, and deny that he has assumed its exercise, must show such facts as, if true, completely invest him with the legal title to it; otherwise, the law considers him a usurper, and denounces judgment against him, leaving the franchise to be held by the state, or such other person as may have a valid legal title thereto, derived by or from some grant or authority from the state.

Do the facts contained in the pleadings under consideration, show the defendant invested with the legal right to hold, enjoy, and exercise the franchise of president of the Real Estate bank of the state of Arkansas? The charter of said bank restricts the right of holding the capital stock thereof to citizens of the state of Arkansas, owning real estate situate therein, during the period of four years from the date of the charter, which was approved on the twenty-sixth day of October, 1836, except in the case of partners, where one of the partners is a citizen of this state, and owns not less than one third of the property taken as security for the stock based thereupon: Secs. 13, 20. The right of becoming a director is restricted to such persons as are stockholders; and the right of becoming a member of the central board of directors, is limited to those who are members of the different boards of directors of said bank; and again, the right to become president of the bank, is further restricted to the three directors who are members of the board of directors of the principal bank, and also of the central board of directors of said bank.

The defendant, therefore, to establish a valid legal title to the franchise in question, is bound to show: 1. The acceptance of the charter by the corporators; 2. That he is a citizen of this

state; 3. That he is the owner of real estate situate in this state; 4. That he is legally a holder of capital stock of said bank; 5. That he is a director of the board of directors of the principal bank; 6. That he is a member of the central board of directors of said bank; and 7. That he is president of said central board.

As regards citizenship, the simple averment in the plea, that the defendant is a citizen of this state will be sufficient. But to show that he is the owner of real estate situated in this state, inasmuch as that fact must depend upon a grant from the United States, or some grant or concession confirmed by their authority, and the defendant, whether he be the grantee or confirmee, or derives his title thereto by direct conveyance from the grantee or confirmee; or by and through other intermediate conveyances, or by descent, devise, or other legal transfer, can only establish his title by exhibiting the deeds, or records by which it is acquired; all of which the law presumes to be in his possession; consequently as he has their legal custody, and is presumed to know the facts by which he can establish his title to the estate, better than his adversary, he must, according to the well-settled principles of pleading, by appropriate averments in his pleading, describe the real estate owned by him, show that it is situate in this state, and how he derives title thereto, so that the court may see and determine whether or not he is the legal owner thereof, and if necessary to the attainment of justice, that an issue may be formed thereupon as to that fact. In this respect, the defendant's pleading is defective and insufficient.

According to the provisions of the charter, capital stock of the bank could be acquired originally by citizens of this state only (except in cases embraced by the proviso to the twentieth section of the charter), who subscribed therefor, at one of the places named in the fourth section and within the time prescribed by said fourth section of the charter; who were in good faith owners and possessors of land situate within this state, which land or a part thereof was in cultivation, or on which the subscriber then resided and had his homestead, with the intention of extending the cultivation and improvement thereof as required by the fifteenth section of the charter; and caused the same to be appraised according to the requisitions of the sixth section, and secured the stock so subscribed for, by mortgages of such land, and by bonds executed to the bank in conformity with the provisions of the fifteenth section of the charter, perfected to the satisfaction of the managers, appointed and acting according to the directions and prescriptions contained in the fifth section.

Upon such securities being approved by the managers as sufficient, and the amount of stock to which each subscriber was entitled, being by them ascertained and adjusted, in the manner prescribed by said fifth section of the charter, and a schedule made by said managers, as required by the section last mentioned, every subscriber, whose security was so approved and whose subscription had been so adjusted, according to the obvious design and meaning of the provisions of the fifth and seventh sections of the charter, is to be considered the holder of so much of the capital stock of said bank, as appears to have been thus secured and awarded to him, and entitled to all the benefits accruing therefrom, and subject to all the responsibilities incident thereto, until he voluntarily parts with his stock, or is legally divested of it in some manner authorized by law. It follows, therefore, that the defendant, according to the principles before stated, is bound to show by appropriate averments in his pleading in response to the demand of the state, that there was a board of managers as contemplated by the fifth section of the charter; that such board was legally constituted in pursuance of, and according to the provisions in said fifth section contained; that said managers received from the superintendents named in the fourth section of the charter, the books of subscription together with the titles and other documents accompanying the same, and made out a schedule therefrom as directed by said fifth section; that eleven thousand two hundred and fifty shares of the capital stock of said bank, appeared to said managers to have been subscribed for, and that all mortgages intended to secure the same had been perfected to their satisfaction, and that said managers thereupon awarded to him, or (according the fact) to the person from whom he derives his title to the stock (if he is not a subscriber therefor), a certain amount of the capital stock of said bank, and in the latter case show further how he has acquired title to the stock, so awarded to another; and exhibit the title deeds, or records, by and through which he derives title to the stock in question, or show some legal excuse for their non-production, so that it may appear to the court, that he is the legal holder of the stock, and that the same has been awarded, and if transferred, that it has been legally transferred to him in the manner prescribed by the charter and according to the provisions of law.

If the defendant claims to have been elected a director of the bank, of the board of directors for the principal bank at Little Rock by the stockholders themselves. he must show the ordi-

nance of the central board of directors appointing the time and place for holding such election, and the notice thereof, as well as every other ordinance or act of the central board relating to such election; that is, he must exhibit so much of the ordinances and acts of the central board as are necessary to show that such election was legally held, and by proper averments show that it was held agreeably to law and in conformity with and in pursuance of the ordinances and regulations of the central board, and that he received a majority of the legal votes given at such election, and was thereupon legally qualified and inducted into said office. But if he claims the office by virtue of an election by the board of directors to supply a vacancy therein, he must show that there was at the time of his election a board of directors competent to elect, of which some prior incumbent of the office was a member and whose place had become and was vacated, and continued vacant at the time of his election by the board, either by his death, resignation, or absence from the United States, non-acceptance, refusal to qualify, or removal from office, and in the latter case, the order, resolution, or sentence, by virtue of which he was removed, must be shown, and he must also further show his election to fill such vacancy, and his subsequent legal qualification and induction into said office. If he claims the office by virtue of an appointment by the governor, he must in like manner show the appointment; and if it be to supply a vacancy, show how the vacancy arose.

The defendant must also show that there was a board of directors for the principal bank at Little Rock for the transaction of business competent thereto, and that he was selected by such board a member of the central board of directors; and then show that there was a central board of directors, constituted according to the provisions of the charter, and acting as such, and that he was by such central board elected president of the central board of directors. All of these facts the defendant is bound to show, because his title to the office in question depends upon their existence. And they, like all other facts pleaded, must be set forth in legal form and with reasonable certainty, so as to show in the defendant *prima facie* the legal title to the franchise in question and form the basis of an issue, if the attorney for the state shall deem it proper to controvert the truth of the facts as pleaded, or, admitting their truth, to show other matter in avoidance, or which estops the defendant from claiming title to the office.

That we may not be misunderstood as to the view which we have taken of the subject before us, we deem it proper to add, that we consider the managers, whose appointment is authorized and required by the fifth section of the charter, as possessing a special authority only, particularly defined and expressly limited, and therefore, any person, claiming a right which could only be acquired through or by their acts or proceedings, must show that the matter was within their cognizance, and that they acted in pursuance of the authority with which they were clothed; that the board of managers, when legally constituted and organized, possessed the exclusive right of determining in the first instance, upon the sufficiency of the security offered by the subscribers for stock, and also the amount of stock each subscriber had secured and was entitled to according to the rules prescribed in the fifth section of the charter: consequently their decision as to the sufficiency of the security and the amount of stock to which those who subscribed therefor, during the period limited for subscriptions, upon the first opening of the books of subscription, were severally entitled, must be considered as determining *prima facie*, the right of each subscriber to share or not share the capital stock of said bank, as well as the amount which those who appeared to them entitled to share the stock, had respectively secured to their satisfaction, and thereby acquired the right to hold. And, in our opinion, such of the subscribers, as by the final determination of the board of managers were admitted to be entitled to stock, became *ipso facto* stockholders, and were thereupon respectively entitled to all the rights, privileges, and immunities conferred by the charter upon the stockholders in said bank. And therefore in pleading to show his legal title to stock, such original subscriber is only bound to show that he was a citizen of this state (or is embraced by the proviso to the twentieth section of the charter) and the owner of lands situate therein; that a board of managers was appointed and organized, according to the provisions of the fifth section of the charter; that such board received the books of subscription, title deeds, mortgages, and bonds from the superintendents named in the fourth section of the charter, and made a schedule as directed in the fifth section thereof, and determined that he was entitled to a certain amount of the capital stock of said bank, with proper averments, showing that his subscription for stock was made within the time limited by the charter. These facts are sufficient in law to create a legal title to stock, and notwithstanding the holder thereof may be di-

vested of his right, it is not necessary for him to show it, but the state, if she wishes to take advantage of it, must show the fact by way of replication to the defendant's pleading. We do not, however, deem it necessary to express any opinion as to the grounds upon which, or the mode of proceeding by which, a stockholder may be divested of his stock, as that question is not legitimately presented by the pleadings before us.

We also think it proper to state that the defendant, in order to show a legal title to exercise the office of president of the bank, need not show that the several members of the different boards of directors, by and through whose election or selection, he derives title to the office, were either citizens of the state, or stockholders, or directors *de jure*, as the law presumes those who act in that capacity under color of right, as possessed of every requisite qualification, and that their acts are authorized and valid until the contrary appears; and therefore, in this respect, his pleading will be sufficient, if it shows in each instance a board of directors acting under color of legal right, and in every other respect legally competent to make such election or selection, as the case may be, leaving their incapacity, disqualification, or want of qualification, if any exists, to be shown by the state in avoidance of the right so shown by the defendant. The defendant however, as to the facts necessary to be stated as well as the mode of stating them, stands precisely in the attitude of every other suitor in court; and therefore he is only bound to show in the first instance such facts as, if true, confer upon him a legal right to exercise the franchise in question. But like other suitors, he is bound to show, by his pleading, all deeds, ordinances, records, and written documents, without which he could not acquire or possess the legal right to hold or exercise the franchise; and if he fails to do so, without showing some valid excuse for not doing it, his pleading must for this cause be deemed insufficient.

This explanation of the views which we entertain in regard to the legal requisites of the defendant's pleading in the case before us, and of the principles upon which some of our conclusions are based, we think sufficiently explicit to prevent any misconception thereof, and therefore we deem it unnecessary to say more on the subject. The rule as to prolixity in pleading does not dispense with the statement in a concise and legal manner of such facts as are indispensable to show a legal right to the thing demanded, or a valid legal defense against the right claimed, or demand made by the plaintiff, nor can any pleading

containing nothing more be legally objected to on account of its length.

From this exposition of the law it will be perceived at once, that no one of the pleas of the defendant contains all of the facts essential to show a legal right in the defendant to exercise the franchise of president of the Real Estate bank of the state of Arkansas; and therefore the demurrer thereto is well taken and must be sustained.

The defendant subsequently offered an amended plea; but the state objected upon written exceptions to its being filed. After argument thereon the court held the plea bad in not proceeding, after stating the award of stock, to show notice thereof given by the board of managers, the election of directors and of a central board, and the organization of the bank by the election of president; and they further held it bad, because it set up the fact that Collins, who had been elected a director and his seat refused him, and Harris elected to fill the vacancy, was not a citizen of the state—a matter as to which the boards had not adjudicated, when they decided on his claims to his seat, and not taken by them as one of the grounds for refusing him his seat; and because it stated that the transfers from the original stockholders and others, whose assignee Harris was, were not entered upon a transfer book; for it was held that the ordinance of the central board was imperative and could not be disregarded by the local boards; and that if no transfer book had been provided, no person had become a stockholder by any transfer which had taken place; and that a transfer book must be opened and the transfer entered on it, before the transferees could become stockholders. They therefore refused leave to file the plea, whereupon the defendant declined offering any further defense, and judgment of ouster was entered accordingly.

EFFECT AND OBJECT OF WRIT OF QUO WARRANTO: See note to *People v. Rensselaer & S. R. R. Co.*, 30 Am. Dec. 44. See *State v. Evans*, *post*.

STATE v. EVANS.

[3 ARKANSAS, 535.]

PROCEEDING BY QUO WARRANTO IS A REMEDY by which the state may at pleasure require any citizen exercising a public franchise or authority which he can not legally exercise without some grant or authority from it to show the warrant under which he acts, in order that there may be a determination of his legal right.

OUST AND EFFECT OF THE PROCEEDING by *quo warranto* is either to oust the party defendant of the franchise, if he fails to show in himself a complete legal right to its exercise; or if the franchise has been legally granted, but has been forfeited by the defendant or those under whom he claims, then to seize it into the hands of the state.

INDM.—WHERE A PERSON IS LEGALLY ENTITLED TO THE EXERCISE OF A FRANCHISE, he can not by *quo warranto* be prohibited or restrained from the doing of any particular act or thing, the right of doing which is claimed by virtue of such office or franchise, and constitutes only an integral part of the rights, powers, and privileges incident thereto. Thus

a judge legally elected, can not be prohibited by such a proceeding from taking cognizance of and adjudicating any suit or proceeding instituted and pending for adjudication in any court which he is authorized to hold, although such court may not legally possess jurisdiction over the matter.

QUO WARRANTO requiring the defendant to exhibit the authority by virtue of which he claimed to exercise jurisdiction over two cases then pending in the circuit court for Pulaski county, in each of which William E. Woodruff was a party; it being represented in such writ that no disqualification to try such causes existed in Hon. J. J. Clendenin, the judge of said court. A plea was put in, wherein it was shown that the said Hon. J. J. Clendenin had prior to the issuance of the writ officially certified to the governor his disqualification to preside in certain cases then on trial in his circuit, wherein the two cases in question were included, and that thereupon the governor had appointed and commissioned defendant special judge to try all the cases included in the certificate. The replication admitted the truth of the facts stated in the plea; but asserted that the sole reason which had caused Judge Clendenin to certify his disqualification to sit in the two cases mentioned in the writ was his supposed relationship by affinity to William E. Woodruff, whereas the fact was that no such relationship existed. There was a joinder in demurrer upon the replication.

Ashley and Watkins, for the state.

Gilchrist, *contra*.

By Court, Rmeo, C. J. The pleadings, although they are in some respects rather uncertain and informal, are believed to be substantially good, if the facts disclosed are such as in law authorize the writ, or enable the state to require the defendant to show his warrant or authority to preside upon the trial of and adjudicate the cases therein mentioned. The first question, therefore, to be determined, is, whether the action or legal remedy for the wrong supposed to have been committed, has not been misconceived? It must, we think, be conceded, that the common law regards the proceeding by writ of *quo warranto* as the most appropriate remedy for the king, by which he may at pleasure require any subject exercising a public franchise or authority which he can not legally exercise without some grant or authority from the crown, to show by what warrant or authority he exercises it, and thereupon demand and have a judicial trial and determination of the legal right of the defendant to exercise such office or franchise; and that, by analogy, the

state here may in like cases have the same remedy. But here, as in England, the object and effect of the proceeding must be either to oust the party defendant of the franchise, if he fails to show in himself a complete legal right to its exercise, derived from or under the authority of the state, or, if the franchise has been once legally granted and has been forfeited by the defendant or those through whom he derives title to it, to seize it into the hands of the state. But it is believed that no precedent can be found where this writ was ever issued for the purpose of restricting or preventing any one legally possessed of a public office or franchise, from exercising any right, authority, or privilege incident thereto, or claimed by virtue thereof. It is a legal proceeding, authorized exclusively for the purpose of investigating and determining, by judicial authority, the legal right to a public office or franchise, but is not nor ever was authorized by the common law to be used as the legal instrument or means of prohibiting or restraining a public officer, or person exercising a public franchise, from the doing of any particular act or thing, the right of doing which was claimed by virtue of such office or franchise, and constituted a portion only or an integral part of the rights, powers, and privileges incident thereto.

For example, although it is the appropriate legal proceeding to oust or remove from office, by judicial authority, a person who is ineligible to the office of judge of the circuit court, or who has not been legally elected, appointed, commissioned, or qualified to hold such office, yet if the office be held by a person eligible thereto, who has been legally elected, or appointed, commissioned, and qualified to hold it, he can not by such proceeding be legally prohibited or prevented from taking cognizance of and adjudicating any suit or proceeding instituted and pending for adjudication in any court which he is by law authorized to hold, although such court may not legally possess jurisdiction of the matter, or authority to adjudicate and determine the controversy. So, if the commission be special, to hold plea of and adjudicate and determine certain cases particularly mentioned and described, a portion only of which he can legally adjudicate and determine, and he assumes jurisdiction over all of the cases so mentioned and described, notwithstanding the want of legal authority in him to adjudicate and determine a part of them, he can not be legally restrained or prohibited therefrom as to the cases only which he has no legal right to take cognizance of, try, and decide, by any proceeding upon a

writ of *quo warranto*; because the object and effect of the proceeding in such case would not be to oust or divest him of the office itself, but only to prohibit him from exercising a power incident to the office in regard to a particular case; thus conceding to the defendant the legal title to the office, and denying only his legal right to exercise it over a particular case, or in reference to some particular matter or subject, which is not, and never was, the legitimate office or object of such writ, or the proceedings thereupon authorized by law.

The defendant shows that the judge of the fifth judicial circuit, embracing the county of Pulaski, had officially certified to the governor the fact of his disqualification to preside on the trial of sundry cases then pending in the circuit court of said county, which were specially designated, and among which were the cases mentioned in the writ; and that the governor thereupon appointed and commissioned specially the defendant for the trial and determination of the cases so certified, which were also specially enumerated in his commission, including with others the cases mentioned in the writ; and these facts are not controverted by the state, but are, by her replication, admitted to be true. The defendant, therefore, from aught that appears in the pleadings before us, is eligible to and legally possessed of the office of judge of the circuit court, and notwithstanding his office and authority are limited to the trial and determination of the cases specified in his commission, he was unquestionably invested with legal authority to hold the circuit court in which such cases were pending, for their trial and determination, and in reference thereto, was clothed with all the powers appertaining to said court, and was by law to preside therein pending their trial and determination, unless prevented by some legal remedy applicable to the case, and interposed, prosecuted, or presented by the parties themselves, instead of the state, if in fact he had no legal jurisdiction of, or right to try and determine a portion only of the cases mentioned in his commission.

The writ before us does not require the defendant to show by what warrant he exercises the office or franchise of judge of the circuit court in and for the county of Pulaski, but simply demands of him to show by what authority he exercises said office in respect to the two cases therein mentioned, being a part only of the cases he was commissioned specially to try. Nor does the replication question his legal right to the office itself, but simply denies the disqualification of the regular judge of the fifth judicial circuit, to adjudicate the cases mentioned in the

writ, thus attempting, as it were, to divide the office, and to consider it as a distinct office depending upon a separate warrant in reference to each case, which the judge is commissioned specially to try and determine, contrary to the fact, as well as every principle of law and justice. This principle, if admitted to be true, might subject the officer to the vexation and expense of exhibiting his authority in every case pending for his adjudication, and a judgment in one case would be no bar to the demand made of him in another, nor could any judgment of ouster from office, or other legal judgment, that we are aware of, be pronounced against him in such case.

And therefore we are of the opinion that the legal remedy for the wrong, if any has been committed by the supposed unauthorized and illegal certification, to the governor by the regular judge of the circuit court of Pulaski county, of the cases mentioned in the writ, has in this proceeding against the defendant been misconceived. And for this reason the demurrer to the replication must be sustained.

See *State v. Harris*, ante, 460.

CASES
IN THE
SUPREME COURT OF ERRORS
OF
CONNECTICUT.

VANBUSKIRK v. HARTFORD FIRE INS. CO.

[14 CONNECTICUT, 141.]

ASSIGNMENT OF A CHOSE IN ACTION IS OF NO EFFECT as against subsequent purchasers, without notice, from the assignor, or against his attaching creditors, unless within a reasonable time after the assignment notice thereof is given to the debtor.

SCIRE FACIAS. The plaintiffs instituted their suit against Joseph Mortimer, a non-resident, by process of foreign attachment, wherein they attached the indebtedness due to said Mortimer by the present defendant. The writ was served on defendant on the twenty-fourth of February, 1837. The indebtedness had accrued to Mortimer by reason of the loss by fire of certain property covered by a policy of insurance issued to him by defendant. Joseph Mortimer was a citizen of the state of New York, and in that state, on the fourteenth day of February, 1837, for a valuable and sufficient consideration, assigned and delivered to John Mortimer the policy on which defendant was liable to him. Evidence was adduced to the point that by the law of New York an assignment of a chose in action upon delivery of the instrument to the assignee transferred to the latter the title, without the necessity of notice to the debtor of the assignment. On the third of April, 1837, John Mortimer first gave defendant notice of the assignment, though during the whole period intervening between the day of the assignment and the notice, regular daily communication by mail existed between the residence of said assignee and the town of

Hartford, the residence of the debtor. Upon this state of facts, the case was reserved for the opinion of this court.

W. W. Ellsworth, for the plaintiffs.

Hungerford and Cone, contra.

WAITE, J. The plaintiffs brought their suit by foreign attachment, against Joseph Mortimer, and attached a debt claimed to be due to him from the defendants upon a policy of insurance. Having recovered judgment in that suit, they brought their *scire facias* against the defendants to recover their demand. Payment was resisted, by the defendants, upon the ground of an assignment of the debt made to John Mortimer, previous to the attachment. It is found, by the court below, that no notice of that assignment was given to the defendants until long after the attachment.

The question arising in this case, is, whether the plaintiffs are entitled to recover. If the case is to be governed by the laws of this state, it is clear, that the defense can not prevail: for the rule here is well settled, that, in order to perfect an assignment of a chose in action, as against *bona fide* creditors and purchasers without notice, notice of such assignment must be given to the debtor within a reasonable time; and unless such notice is given, creditors may attach and acquire a valid lien; and others may purchase the debt, and gain a title superior to that of the first assignee: *Bishop et al. v. Holcomb*, 10 Conn. 444; *Judah v. Judd*, 5 Day, 534; *Woodbridge v. Perkins*, 3 Id. 364. And so far as regards subsequent purchasers, the same law is fully recognized and established in England: *Williams v. Thorp*, 2 Sim. 257; *Dearle v. Hall*, 3 Russ. 1; *Loveridge v. Cooper*, Id. 30; *Foster v. Cockerell*, 9 Bligh, 332; 2 Story's Eq. 301. Here no notice of the assignment of the debt to John Mortimer was given to the defendants until after the attachment; and it is not claimed, that the plaintiffs had any knowledge of that assignment. They, therefore, by the law of this state, acquired a lien paramount to the title of the assignee. In this respect, an attaching creditor stands in a situation, very similar to that of a subsequent purchaser. He obtains a lien upon the debt, as valid as the title acquired by a purchaser. But although it is not denied by the defendants, that such is the law of Connecticut, yet it is claimed by them, that the assignment was made in the state of New York, where a different rule of law applies in relation to assignments of choses in action; and that upon the

principles of comity, the same effect ought to be given to the assignment here, as would be given to it in that state.

But does it appear that the law of the state of New York differs from ours? It is found by the court (and as we are informed in the language of the witness), that "an assignment of a chose in action is effectual to convey the title to the assignee, upon delivery of the instrument; and no notice need be given, by the debtor, that such claim against him had been assigned." That undoubtedly is the law here, so far as regards the parties to the assignment. It is even good as against all persons who have notice of the assignment. But would it be effectual as against attaching creditors, and subsequent purchasers without such notice? That fact is not found by the court; nor, in our opinion, is it a necessary inference from what is found.

To justify the conclusion that the laws of the state of New York so widely differ from ours and those of England, upon a principle, which we believe so correct and salutary, as that requiring notice to be given of the assignment of a chose in action, to protect it against the subsequently acquired rights of other persons, it ought to be made distinctly to appear, and not left to any forced construction. What would be the effect of such a conflict of laws upon the present case, were it proved to exist, we do not deem it necessary to determine. Upon that question there are various and conflicting decisions: *Richmondville Manufacturing Company v. Prall et al.*, 9 Conn. 487; *Olivier v. Twines*, 14 Mart. 97; *Pomroy et Uz. v. Rice*, 16 Pick. 22; *Daniels et al. v. Willard*, Pick. 36; *Burlock v. T aylor*, Id. 335.

But as we are not satisfied from the finding of the court below, that any material difference exists between the law of this state and that of New York, we are of opinion, that the plaintiffs are entitled to judgment for the amount due by the defendants on the policy, at the time the original writ was served upon them.

In this opinion the other judges concurred.

Judgment for the plaintiffs.

NECESSITY OF NOTICE TO DEBTOR OF THE ASSIGNMENT OF THE CHOSE IN ACTION.—In speaking of the state in which the authorities have left this question, McKinney, J., delivering the opinion of the court in *Clodfelter v. Cox*, 1 Sneed, 339, says: "There is an irreconcilable conflict of authority upon this subject. The weight of American authority seems to be that the assignment of a chose in action is complete in itself, and vests a perfect title in the assignee as against third persons, without notice of the assignment to the debtor. But the contrary of this is the settled doctrine of the English

as well as of some of the courts of this country at the present day. The latter we consider as the more reasonable and safe practical rule, and have accordingly held on more than one occasion, that the assignment of a chose in action is not complete, so as to vest the title absolutely in the assignee, until notice of the assignment to the debtor; and this not only as regards the debtor, but likewise as to third persons. And, therefore, as between subsequent purchasers or assignees of a chose in action, he is entitled to preference who first gives notice to the debtor, although his assignment be subsequent to that of the other. To perfect the assignment not merely as against the debtor, but also as against creditors and subsequent *bona fide* purchasers, notice must be given. Hence it follows that an attachment by a creditor, in the period intervening between the assignment and the notice, will have preference."

Perhaps this view of the authorities is not strictly correct, and it would be more proper to say that, by the preponderance of authority, an assignee of a chose in action without notice to the debtor will be protected against the claims of the creditors of his assignor, but not as against the claims of a subsequent assignee for value and in good faith. This rule is the one countenanced by the English cases: See *Kinderley v. Jervis*, 22 Beav. 31, *Pickering v. Ifracombe R. Co.*, 3 L. R. C. P. 235, both holding that the claims of an assignee, though no notice has been given of the assignment, are paramount to those of the creditors of the assignor, and commenting upon and virtually overruling *Watts v. Porter*, 3 El. & Bl. 743, which had held such notice necessary; and see further to the point that the notice is necessary where the claims of a subsequent assignee are interposed, *Dearle v. Hall*, 3 Russ. 1; *Loveridge v. Cooper*, Id. 32; *Tunson v. Ramsbottom*, 2 Keen, 35; *Meux v. Bell*, 1 Hare's Ch. 85; *Foster v. Blackstone*, 1 My. & K. 297.

In this country the cases are discordant. Some courts have followed in the footsteps of that of Connecticut, and held an assignment of a chose in action void both as to the creditors of the assignor and as to subsequent purchasers, unless notice has been given to the debtor. This rule, it is explained, is but the result of an application to the case of an assignment of a chose in action of the principle that renders void, as to subsequent attaching creditors and purchasers without notice, transfers of personal property, where the possession and apparent ownership are left unchanged. Of course it is apparent that if no notice of the assignment is given to the debtor, no opportunity is afforded third persons of ascertaining the transfer, and thus the apparent ownership is left unchanged.

The following cases are in support of the Connecticut view that, as to third persons, whether attaching creditors or subsequent purchasers, it is essential to the validity of an assignment of a chose in action that notice should have been given to the debtor, before the claims of such third persons attached: *Flickey v. Loney*, 4 Baxt. 173; *Bishop v. Holcomb*, 10 Conn. 444; *Judah v. Judd*, 5 Day, 534; *Woodbridge v. Perkins*, 3 Id. 384; *Ward v. Morrison*, 25 Vt. 600; *Campbell v. Day*, 16 Id. 558; *Barrow v. Porter*, 44 Id. 587. Notice, however, to one of two trustees, executors, etc., is sufficient: *Foster v. Mix*, 20 Conn. 395. It would appear, however, that the notice must emanate from the assignee: *Barrow v. Porter*, *supra*; *Dale v. Kimpton*, 46 Vt. 76. But notice to the debtor is unnecessary, if the attaching creditor himself had notice of the assignment: *Bishop v. Holcomb*, 10 Conn. 444.

Tennessee is one of the states whose courts require notice to perfect the assignment; but one exception has there been grafted upon the rule. It is this, that notice is not necessary if the chose in action is evidenced by some

written instrument, such as a bond, note, etc., which at the time of the assignment was transferred: *Gayoso Savings Institute v. Fellows*, 6 Coldw. 472. This case conflicts with the principal case, since there the assignment was of a chose in action evidenced by a policy of insurance, which was delivered over at the time of the assignment, and which was yet held void as to a subsequent attaching creditor because no notice had been given the debtor. We think that the doctrine of the principal case, adopting the basis which the courts of Connecticut and Tennessee have both taken, is preferable; for though it be true that if the bond or note is not in the possession of the assignor, this might be enough to affect a subsequent assignee with notice, surely its transfer would not afford any aid to the creditors of the assignor in obtaining knowledge of the assignment. As we have said before, however, some of the courts hold an assignment of a chose in action perfect, as to creditors of the assignor, without the necessity of notice to the debtor. In support of this proposition are the cases of *Thayer v. Daniels*, 113 Mass. 131; *Dix v. Cobb*, 4 Id. 508; *Wood v. Partridge*, 11 Id. 488; *Pellman v. Hart*, 1 Pa. St. 265; *United States v. Vaughn*, 3 Binn. 394; *Stockton v. Hall*, Hard. (Ky.) 168; *Bholen v. Cleveland*, 5 Mason, 174. Some of these cases go so far as to declare that notice to the debtor is unnecessary as to all third persons; but in none was it necessary to do more than decide that the notice was not essential as far as the creditors of the assignor were concerned.

In New York, however, in *Muir v. Schenck*, 3 Hill, 230, it is decided that a first assignee shall be preferred to a second assignee, though no notice of the assignment had been given to the debtor, and the second assignee had no actual knowledge thereof. This is in disregard of the rule, that where one of two parties has enabled a third, either by his negligence or active co-operation, to perpetrate a fraud, all the evil consequences shall be visited upon him.

Opposed to this decision, besides the cases first cited, is the case of *Murdock v. Finney*, 21 Mo. 138, as well as a dictum in *Pellman v. Hart*, 1 Pa. St. 265, where the court, while deciding the notice to be unnecessary as to an attaching creditor, say that it is required as to a subsequent assignee for value.

HOOKER v. NEW HAVEN AND NORTHAMPTON CO.

[14 CONNECTICUT, 146.]

TAKING PRIVATE PROPERTY FOR PUBLIC USE, WHAT IS.—The legislature can not authorize a public use, the natural result of whose operation will be to deprive the owner of adjoining property of its beneficial use, without allowing compensation to the party injured. It can not authorize a canal whose existence will cause the flooding of adjoining land, without allowing compensation.

IF THE LEGISLATURE FAIL TO PROVIDE A REMEDY for an injury occasioned by a public use, for which injury nevertheless the party injured is entitled to recover by reason of constitutional provisions, he will be remitted to his common law remedy for the recovery of the damages suffered.

CASE. The opinion states the case.

Toucey and T. C. Perkins, in support of motion for a new trial.

W. W. Ellsworth, contra.

WILLIAMS, C. J. The plaintiff having, as he claimed, proved the injury done to his property, by means of the waters of the canal being discharged in such a manner as, after running through the lands of other persons, to flow upon his, and greatly injure it, demanded compensation in damages from the defendants. It was claimed, and not denied, that the canal and waste-weir were constructed under the direction of the commissioners appointed by the legislature according to the provisions of the act of incorporation; and the defendants claimed, that the waste-weirs were properly made and used, and that no more water was permitted to flow through the same than was necessary to preserve the dam of the canal from injury. The plaintiff claimed, that one waste-weir was not sufficient in that place, and that the defendants had not used due caution and providence in not having more waste-weirs, and that they had no right to use their waste-weir to the injury of the plaintiff's property. And the court charged the jury, that as the legislature had prescribed how the canal should be constructed, as waste-weirs were indispensable, and as it was admitted that commissioners, duly appointed for that purpose, approved of the waste-weir and its location, it became lawful, and individuals must protect themselves against it; and the inquiry for the jury was, was it so used, or was it used without proper prudence or care? On this instruction a verdict was given for the defendants; and the plaintiff moves for a new trial. The claim was not, that this damage became necessary, by reason of some act of Providence, or some unexpected calamity, but resulted from using the waste-weir, for the necessary protection of the canal, when the waters were high. Neither does it appear upon the motion, that it was claimed, that the plaintiff's remedy, if any, was before commissioners. But the broad ground is taken, that the canal, being authorized by law, and constructed according to the direction of those who were appointed for that purpose, the defendants are not responsible in damages to the plaintiff.

Two questions may here arise: Can the legislature pass an act by which the property of one individual may be greatly injured, by works of this kind, without giving compensation? And have they here attempted to do it? It is no doubt incident to the sovereignty of every government, that it may take private property for public use, of the necessity or expediency of which the government must judge; but the obligation to make compensation is commensurate with the right. The fundamental maxim of a free government requires that the right of personal

liberty and private property should be held sacred: *Wilkinson v. Leland et al.*, 2 Pet. 657. "And it may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any can be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?" *Fletcher v. Peck*, 5 Cranch, 185,¹ per Marshall, C. J.

It is said, the government have a right of eminent domain; in other words, the sovereign power has a right to resume the property given to individuals, whenever the public interest requires it. This, however, is to be done in the manner directed by the constitution and laws of the state. The right of eminent domain, says Chancellor Kent, or inherent sovereign power, it is admitted by all publicists, gives to the legislature the control of private property for public use, and for public use only. He then mentions roads and canals, and adds, in these and other instances, which might be enumerated, the interest of the public is deemed paramount to that of any private individual; and yet even here, the constitution of the United States, and most of the states of the union, have imposed a great and valuable check upon the exercise of legislative power, by directing that private property shall not be taken for public use without just compensation; and a provision for compensation, is a necessary attendant on the due and constitutional exercise of the powers of the law-giver, to deprive an individual of his property without his consent; and this principle in American jurisprudence is founded in natural equity, and is laid down by jurists, as an acknowledged principle of universal law: 2 Kent's Com. 339.

It is said, the land is not taken; and therefore, no compensation is to be made. At the time the canal was laid out and built, it is evident that this land was not taken and devoted to the public use; and we have no evidence before us tending to show, that it was within the contemplation of the parties, or the canal commissioners, that this land could be injured or affected by the canal. Of course, no provision was made for such an injury, at that time; and so far as appears by this motion, it was not a point made below; and consequently, it is not one now before the court, whether the damages that might subsequently arise could not be appraised, by the commissioners; and if so, if that was not the only forum. In the review of this case, it is assumed, therefore, that the commissioners had no such power.

1. 5 Cranch, 87.

We come then to this question, whether the act of incorporation, if faithfully followed, will protect the defendants against a claim for damages to his property. If it will, it must be because the act expressly provides for such a case; or because it gives another remedy; or because, from a fair construction, this is the manifest intent of the legislature, and authorized by the constitution. As to the first. It can not be contended that there is any express justification of such an injury in the act itself. As to the second. That question not appearing to have been made below, does not, within the rules of this court, arise here. The defense, then, must rest upon this, that a fair construction of this act protects them against the claim of the plaintiff.

To determine this we must look at the act of incorporation. The first and second sections incorporate the company, and authorize the construction of the canal. The third section gives power to hold real estate, surplus water, etc., and to make the canal, with necessary dams, waste-weirs, locks, etc. The fourth creates a board of commissioners, with power to survey and lay out the route of the canal, with all the works connected therewith, and notify the parties, and appraise the damages. The fifth provides, that the corporation may enter upon and take possession of any lands, waters, and streams necessary for the prosecution of said improvement; and the commissioners are to assess the just and necessary damages occasioned thereby; and the lands, waters, and streams so taken shall be owned and possessed by said corporation, for their use forever. The sixth section provides, that as the works may be injured, by unforeseen accidents, the company may enter upon lands adjacent, and carry away stone, gravel, and timber, as may be necessary and proper to repair the same; which damages are to be assessed by the commissioners. The seventh section provides for an appeal from the commissioners. The twenty-first section appoints the commissioners, and provides for their compensation, and that they shall, from time to time, inspect the construction of said canal and works connected therewith, and report; and when it shall be completed, commissioners are to be annually appointed. By the twenty-third section, the commissioners are required annually or oftener, to inspect the canal, bridges, etc.; and if out of repair, or if the locks are not faithfully tended, may stop the toll. These are, it is believed, all the provisions of the charter which in any way bear upon the subject. And upon a careful

inspection, a majority of the court can not admit, that the charter warrants the construction claimed by the defendants.

The route of the canal, the works upon it, and the damages done by it, are to be subject to the decision of the commissioners. Unless, therefore, the canal was made in the place designated, and the works constructed in the manner approved, by the commissioners, it would not be the canal of the charter. This being done, and the damages assessed and paid, it became a canal legally authorized, and the company became vested with a legal right to the enjoyment of their property. But a very different question arises, when the company in consequence claims a right so to use this property as to do injury to others without compensation. They must have a right to use the canal for the purposes for which it was designed; but does this imply that, to protect themselves in this enjoyment, they have right to injure their neighbor? An individual has good right to his house and lands, to use them at his pleasure. The water from his roof may greatly interrupt this use; but this gives him no right to turn it upon his neighbor's land. When the legislature gave to this company power to construct this canal, they authorized them to take the land necessary for that purpose, and also what might become necessary to repair it afterwards, making just compensation. But we look in vain for authority in this company to protect the property thus acquired, in any other manner than an individual has to protect his own property, except so far as it is given by the sixth section.

When we consider the solicitude with which individual rights are guarded in all free countries, and especially by our own constitution; when we see how careful the legislature have been, in this very charter, to provide for injuries which were contemplated to arise; we think we should not do justice to the intention of the law-givers, in supposing that they intended that the vested rights of individuals should be taken away, or essentially impaired, by the acts of this artificial person, more than by the acts of individuals. At least, we must require very clear evidence that such was their intent, before we can say, that it has been done, and no compensation provided. A turnpike company must have a right to repair their road and to protect it; yet they have no right to turn the water, which washes the road, on to the land of another person to his injury: *Boughton v. Carter*, 18 Johns. 405. If it is said, that by the provisions of the sixth section, the payment of damages is provided for; the answer is, that this section provides, that the lands, water, and

streams so taken shall belong to the corporation forever. Unless the injury here is of that kind, that payment of damages vests the title in the defendants, it can not be included in the provision of this section; and if it is, it would seem to be cognizable by the commissioners.

The great argument, however, is, that as the canal, in its construction, and particularly as it respects this waste-weir, has been approved by the commissioners, the company are justified in the prudent use of the works so constructed; and as the commissioners sanctioned a single waste-weir in this part of the works, the prudent use of this waste-weir must also be sanctioned. This may justify the company in making but a single waste-weir. It is evidence that the commissioners were of opinion that one waste-weir was sufficient to prevent injury to the company or to individuals from the water of the canal. But suppose that they were mistaken, and that it was not sufficient; is there any evidence that the commissioners themselves intended that they should use it to the injury of third persons, rather than sustain the damage themselves? Or if they did so intend, we should demand their authority to do this. An individual may use his own property, without intent to injure his neighbor; but if in so doing, he does him a damage, he must be answerable. For in all civil actions, the law doth not so much regard the intent of the actor as the loss and damage of the party suffering; and although a man does a lawful thing, yet if any damage do hereby befall another, he shall answer it, if he could have avoided it. As if a man lop a tree, and the boughs fall upon another *ipso invito*; yet an action lies. I have land through which a river runs to your mill, and I lop the fallows growing upon the river's side, which accidentally stop the water, so as your mill is hindered; an action lies. If I am building my house, and a piece of timber falls on my neighbor's house, and breaks part of it; an action lies. If a man assault me, and I lift up my staff to defend myself, and in lifting it up, hit another; an action lies by that person; and yet I did a lawful thing. And the reason of all these cases, is, because he that is damaged, ought to be recompensed: *Lambert et al. v. Bessey*, T. Raym. 423, 467, 468. So in an action for an assault, where the defendant, a trained soldier, was skirmishing with the plaintiff and his company, and the defendant, with his musket, *casualiter, et per infortunium, et contra voluntatem suum*, in the discharge of his gun, hurt the plaintiff, it was resolved for the plaintiff; and it was held, that no man, not even a lunatic, shall be excused of a trespass, except it be adjudged utterly

without his fault: *Weaver v. Ward*, Hob. 184. And where trespass was brought for entering a close, and taking a horse, and the defendant pleaded that he, for fear of his life, by threats of twelve men, went into the plaintiff's house and took the horse, the plaintiff demurred, and it was adjudged for him, because the threats could not excuse the defendant and make satisfaction to the public: *Gilbert v. Stone*, Style, 72. Lord Bacon says, if a person be assaulted in his own house in a city or town, and distressed, and to save his own life, sets fire to his own house, which spreads and takes hold of the adjoining house; this is not justified, because I can not rescue my own life, by doing anything against the commonwealth: 15 Vin. Abr. 535.

If the common law so restricts individuals in the protection of their own property and lives, can we suppose that powers so extensive were by implication given to this corporation? If the approval of the work by the commissioners was to be a perpetual shield to the company for all injuries which might in future be done to individuals, would not all persons be called upon to object before such approval? As it is, it is a mere *ex parte* concern, of which the public have no notice, and in which individuals have hitherto understood they had no interest. Such approval will give the company a right to take toll according to the provisions of the charter; but it by no means follows that it will protect them from damages done to individuals. Where a turnpike company, under a favorable report of commissioners, had received from the governor a license to collect tolls; upon a *quo warranto*, it was held not to be sufficient evidence that the road was finished: *The People v. Kingston and Middletown Turnpike Road*, 23 Wend. 194 [35 Am. Dec. 551.]

But supposing that the approbation of the commissioners places the company upon the same ground, as if the particular mode of construction had been pointed out in the act of incorporation; the question then would be, whether the grant of a charter of incorporation to a canal company to construct the canal in a certain manner, with proof that it was so constructed, would justify the company in using it in such a manner as to injure the property of other persons to protect their own. We think that the party that makes this claim is bound to produce some authority in support of it. No such case is produced, except that of *Hollister v. The Union Company* [25 Am. Dec. 36]. On the contrary, we believe that a different principle has been adopted in other states under similar constitutions.

In *Stevens v. The Proprietors of Middlesex Canal*, 12 Mass.

466, 468, a suit was brought against a canal company, which had constructed their works in such a manner that the water oozed through the banks, and injured the plaintiff's meadow. No proof was offered to show that the defendants had done anything not authorized by their act of incorporation; nor that they had been guilty of any negligence, or any default, in the manner of making or maintaining the canal. The court there held, that as the legislature had, in that case, provided another mode of redress, the action would not lie; but they say: "When the legislature authorizes an act, the necessary and natural consequence of which is damage to the property of another, he who does the act can not be complained of as a trespasser or wrongdoer. In the declaration of rights prefixed to our constitution, it is provided, that private property shall not be taken and appropriated to public use, without compensation to the owner. So that if the legislature should, for public advantage and convenience, authorize any improvement, the execution of which would require or produce the destruction or diminution of private property, without affording, at the same time, means of relief and indemnification, the owner of the property destroyed or injured, would undoubtedly have his action at common law, against those who should cause the injury, for his damages. For although it might be lawful to do what the legislature should authorize; yet to enforce the principles of the constitution for the security of private property, it might be necessary to consider such a legislative act as inoperative, so far as it trespassed upon the rights of individuals." There the injury is supposed to proceed directly from the act authorized by the legislature, while in this case the injury does not proceed directly from the act authorized, but from a subsequent act of the defendants, intended to protect them in the enjoyment of the privilege granted. Supposing, then, the act of the defendants in this case, to have been expressly authorized by their charter, and no provision made to indemnify them, the principles of the case cited would, if adopted, be conclusive in support of the claim for indemnity at common law.

The same principles seem to be recognized by Chancellor Kent, in the case of *Gardner v. The Village of Newburgh*, 2 Johns. Ch. 161 [7 Am. Dec. 526]. In that case, the legislature had authorized the village to supply themselves with water from a stream running through the plaintiff's farm, by which the plaintiff claimed he should be much incommoded; and an injunction was granted. The chancellor admits the power of the

legislature; but to render it valid, he says a fair compensation must, in all cases, be previously made to the individual affected, under some equitable assessment to be provided by law. This is a necessary qualification accompanying the exercise of legislative power, in taking private property for public use. The limitation is admitted by the soundest authorities, and is adopted by all temperate and civilized governments, from a deep and universal sense of its justice. The learned judge cites Grotius and other eminent authorities to show, that where the right of eminent domain exists, unfettered by written constitutions, it is a clear principle of natural equity, that when private property is taken for public use, the individual whose property is thus sacrificed, must be indemnified. In that case, he insists, that the legislature could not have intended to interfere with private rights; and there was no reason why the rights of the plaintiff should not be protected: See also *Bonaparte v. The Camden and Amboy Railroad Company*, 1 Bald. 229. And even in England, where there are no such checks as we have upon legislative discretion, so great is the regard for private property, that in theory at least, the law will not sanction the least violation of it. All that the legislature will do, is to compel the owner to alienate his possession for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but legislative authority can perform: 1 Bl. Com. 139.

In a more recent case in Massachusetts, on a bill for an injunction, the defendants pleaded that they had constructed the road and bridge precisely in the manner and in the direction prescribed by the act of incorporation, and had done nothing not authorized by that act. The court say, that the corporation, in the absence of positive enactment, are bound to make suitable bridges, culverts, etc., and to keep them in suitable and sufficient repair, so as to carry off the water effectually. This is implied, because it can not be presumed the legislature would grant authority to enter upon and take private land for public use, on other terms. The extent and limits of the duties and powers, in the absence of positive enactment, must be determined by what is reasonable in each case. If, after all, there should happen to be private property so situated that some damage must be done to it, which could not be obviated, by reasonable precautions, inasmuch as it is expressly authorized by the legislature, in the exercise of the right of eminent domain, such proprietor must be left to seek his compensation

in the mode prescribed by the legislature: *Rowe v. The Granite Bridge Corporation*, 21 Pick. 344, 348. If we adopt the principles of these cases, and suppose, as for the purposes of this case we do, that no provision is made, by the charter, for the assessment of damages by the commissioners, we think that this action must be sustained. It is not to be intended from anything in this charter, that the general assembly meant to give power to this company to take away or essentially impair the rights of other persons, for which they had made no provision.

It is claimed, however, that the case of *Hollister v. The Union Company*, 9 Conn. 436 [25 Am. Dec. 36], decides this case for the defendants; and the judge at the circuit yielded to that opinion. A majority of the court, however, think otherwise. There a company was authorized to remove obstructions in Connecticut river. In doing this, the current was somewhat straightened and made more rapid; and the plaintiff claimed, that his land was in consequence worn away. And the court held, that this being a public navigable stream belonging to the sovereign power, that power had good right to improve its navigation, in the manner done by the defendants; and that when the lands on the banks were granted, they were subject to that condition; and so the owners of these banks, and not the public, were bound to protect them against the damage which might arise from such improvements. This is the ground upon which that case rests. Here, the plaintiff's lands were not upon a great public stream, and are no more subject to be taken for canals without compensation than for turnpike roads. To suppose that they were taken upon any such condition, as if a navigable stream was running through them, is to take for granted the point in dispute. Nor was the damage done, in this instance, the natural consequence of making the canal. It was an act done voluntarily and deliberately, by the defendants, though not maliciously, to protect their own property, at the expense of the plaintiffs. In support of the opinion in that case, the judge cites an English case as analogous. That was an action against persons acting under the direction of commissioners appointed by act of parliament for so raising the highway that the plaintiffs could not get into an arched way through which they used to carry their goods to their warehouse, and had to unload them in the street. It was proved, that the commissioners had not exceeded their jurisdiction; that what was done was necessary and proper to make the street safe for carriages; and the defendants were held justified: *The Governor and Company of*

the British Cast Plate Manufacturers v. Meredith et al., 4 T. R. 794. The judge further goes on to show that the claim made by the plaintiff in that case, was for consequences so remote as would lead to endless litigation, and prevent all improvement. He then adds: "The defendants have not directly invaded the property of the plaintiff. They have not taken it without just compensation; but have acted under authority of the legislature, to which appertains the power of regulating a public navigable river, and produce a remote and consequential injury to the plaintiff's land." In the present case, the injury, though consequential, can not be considered as remote. It flowed directly from the act of the defendants in throwing their surplus water upon the plaintiff's land, and thus depriving him of the use of it; and they claim to take it without any just compensation therefor.

We think, therefore, that there is nothing in the case of *Hollister v. The Union Company*, which ought to disturb the foundation upon which the plaintiff's case rests; and therefore, direct that a new trial be had.

In this opinion CHURCH and STORRS, JJ., concurred.

New trial granted.

Sherman, J., before whom the case was tried below, dissented. After a review of the cases, he sums up his conclusions as follows: "The three following propositions seem well settled: 1. That the only limitation at common law, or by any constitution, to the legislative power over individual property, is, that what is taken must be paid for. 2. That the law which applies where injury to others results from acts done innocently, by individuals, in relation to their private property or other personal concerns, is never adopted in regard to those acts which are authorized for public purposes by the supreme power of the state. 3. That where in the execution or use of a public work, authorized by the legislature, the limits prescribed by law are duly and prudently observed, no action will lie for a consequential injury to the property of another." He considered this view of the law to be supported by the case of *Hollister v. Union Company*, 9 Conn. 436; S. C., 25 Am. Dec. 36, in particular. Waite, J., concurred in this opinion.

DAMAGES FOR PROPERTY INJURED BY A PUBLIC USE, WHEN RECOVERABLE.—This case came again before the court, 15 Conn. 312, whereupon the doctrine of the principal case was reiterated. In *Dinslow v. New Haven & N. Co.*, 16 Id. 103, the question was, whether the corporation defendant, the same defendant as in the principal case, was responsible for the diversion of the waters of a stream, upon which was plaintiff's factory. The defense was, that nothing had been done which was not authorized by defendant's charter, and by the sanction of the commissioners under whose approval they acted. The court held the case not distinguishable from the principal case, inasmuch as in each the injury complained of was the direct result of the works of defendants; the diversion being occasioned by a dam erected by defendant. The

court therefore allowed a recovery in an action on the case. See also *Elliott v. Fair Haven & W. R. R. Co.*, 32 Id. 585.

But where the use of a railroad, accidentally and without neglect upon the part of those operating it, occasions injury, there can be no recovery. Thus there can be no recovery for a loss by a fire originated by a spark from the smoke-stack of defendant's locomotive, there being no pretense of negligence: *Burroughs v. Housatonic Railroad Company*, 15 Conn. 131, distinguishing the principal case. Nor can there be any recovery for the remote and incidental injury that may be occasioned to property bordering on a highway, by a change in its grade: *Skinner v. Hartford Bridge Co.*, 29 Id. 537, citing the principal case. See likewise *Philadelphia & T. R. R. Co.*, *ante*, 202. In *Goodspeed v. East Haddam Bank*, 22 Id. 539, the principal case was cited to the point that corporations might be sued for their torts.

MILLS v. CAMP.

[14 CONNECTICUT, 219.]

RULE REQUIRING TRANSFER OF POSSESSION and actual removal of personal property in order to render a sale or attachment valid as against creditors, is a rule of policy, and not of evidence; and therefore proof of the honesty of the transaction will not be sufficient to remove the legal effect of a failure to remove property attached.

FAILURE TO REMOVE PERSONAL PROPERTY ATTACHED IS EXCUSED where the removal of the property can not be effected without great injury or expense, or where the removal would cause material damage.

CONTINUED POSSESSION IS NECESSARY to the validity of an attachment.

CONTINUAL PRESENCE OF THE ATTACHING OFFICER at the place where the property attached lies is not necessary. There will be a constructive possession sufficient to maintain the attachment lien, if the officer do not suffer the debtor to regain actual possession or to exercise any acts of ownership over the property.

TRESPASS. In October, 1838, plaintiff, as deputy sheriff, attached a quantity of iron ore, about five hundred tons, the property of the Ousatonic iron company, in behalf of certain creditors of the company. The debts upon which the writs of attachment levied by plaintiff issued, were justly due, and judgments were thereafter obtained upon them. At the time the ore was attached it lay in an open field belonging to the Ousatonic company. After the attachment plaintiff informed the officers of the company and their workmen at their adjoining furnace of it, whereupon the operations of the company were discontinued. The ore was worth about three dollars and twenty-five cents a ton; its removal would have cost from twelve and a half to twenty-five cents a ton, and would have rendered necessary the washing of a large portion of the ore at an expense of ten to twenty cents a ton; besides, there would be a wastage

of from ten to fifteen tons. Plaintiff did not remove the property, nor did he either remain himself or leave any one else in charge of the property. In November, 1838, Camp attached the same iron ore, took possession of it, and caused its removal to another piece of ground near by, but not belonging to the company. The debt upon which Camp attached was justly due. This removal of the property was the occasion of this action. The charge of the court below was as to the point of the necessity of the removal of property attached, to the same effect as is the opinion of the court. The jury was also instructed that to preserve an attachment lien the attaching officer must retain "actual or constructive possession" of the property attached; and that it was not necessary that either the officer or his agent should remain constantly with the property attached. The other points in the charge appear from the opinion of the court. The plaintiff had verdict.

O. S. Seymour, in support of the motion for a new trial.

W. W. Ellsworth and L. Church, contra.

SHERMAN, J. It is admitted in this case, that the debts, for which the attachments were levied, were justly due to the respective creditors; and the principal objection made to the plaintiff's right to recover, is grounded on the fact, that the property was not removed, by the plaintiff, but left, where it was taken, on land in possession of the debtors.

That a transfer of possession and actual removal of personal property is necessary in order to render a sale or attachment valid as against creditors, is well established, in this state, as a general rule of law. Its object is, to prevent fraud. The particular fraud, against which the rule is intended to guard, is that which seeks to favor the vendor or debtor, by shielding his property, for his benefit, from the claims of creditors. It is not a rule of evidence only, but of policy. As matter of evidence, the continued possession of a vendor or debtor, who is in embarrassed circumstances, yields a presumption that the process or sale is rather colorable than real; for, in general, no reason can be given why possession should not be taken, except that he should be indulged with the disposition or use of the property to the injury of others. But proof of the payment of a full consideration, or of the justice of the debt for which property is taken on legal process, accompanied with the highest evidence of the honesty of the transaction, will not, in general, be sufficient to repel the legal effect of neglecting an actual removal of

the property. The means of proving a *bona fide* debt, or the payment of an adequate consideration, are so far within the power of the parties, where no debt or consideration actually exists; the difficulty of repelling that testimony, by the creditor, is so insurmountable; and the temptation, on the part of the owner of the property, and his friends, to protect him from the pains of penury, is of such controlling influence, that, as matter of policy, the law has removed the temptation to fraud, by making void, as against creditors, sales of personal property and seizures by legal process, unless accompanied by an actual removal of the property. If, when sold or taken by legal process, it is actually removed from the possession of the vendor or debtor, its use or enjoyment by him is made impossible; and attempts to make feigned sales or seizures for that purpose, are rendered abortive. This rule of municipal law is adopted, with more or less severity, in most places where the common law prevails. In this state, it has been justly considered as wise and salutary, and is rigidly applied, except in certain cases where its application would be impossible or injurious; *Swift v. Thompson*, 9 Conn. 63 [21 Am. Dec. 718]; *Patten v. Smith*, 5 Id. 196. Thus in the familiar instance of the sale of a ship at sea, a delivery can not be made at the time of sale, but it is sufficient, if made as soon as may be after the return of the vessel. And when property attached can not be removed without great injury, as hides in a vat, or paper in a mill, at such a period of the process of manufacture, that a removal would cause material damage or destruction, it is dispensed with. And, for the same reason, if the removal of the ore, in the case under consideration, would be attended with great waste and expense, a just regard to the rights of all parties in interest, would require that it should be left on the place where taken. The officer took possession, by the levy of his attachment. He might retain that possession, if there was no interference of the debtor, while the property lay on the debtor's open field. His continual presence, by himself or an agent, was not necessary. It was sufficient, if he used due vigilance to prevent its going out of his control. That possession be taken and held by the officer, is, in all cases, indispensable, and that when this is relinquished, there is a termination of the lien, is consistent with the charge in this case.

On this point, we approve the opinion given in the case of *Taintor v. Williams*, 7 Conn. 271. Nor is the charge at variance with the opinion of this court in *Hollister v. Goodale*, 8 Id. 332

[21 Am. Dec. 674]. Although in that case the chief justice says, "that the constructive possession, as between vendor and vendee, would be sufficient; but an attachment can only be made by taking actual possession;" and in this, the charge is, that the officer "must retain either the actual or constructive possession;" yet it is very apparent, that this language is used, in the two cases, in a different sense. In the former, it was applied, where no actual possession was ever taken. An officer had the key to the door of a carriage-house; and, on his opening it, another officer stepped in before him, and attached the carriage. The chief justice remarks, that the first officer, who had not taken the article at all, might have such a constructive possession as would be sufficient, if accompanied with a contract of sale from the owner, but did not amount to an attachment. But had the first officer, in that case as in this, previously seized the property, it would not have been contended, that while he was at the door of the carriage-house, the other could have stepped in and taken it from him. In this case, the charge requires, that there should be an actual seizure of the property, and taking it into the possession of the officer; and the continuance of this possession, while he is absent, is denominated "constructive." Such an attachment would not be liable to the objection, which was sanctioned, by the court, in the case cited. The import of the word is sufficiently defined, by the judge, when he says, that if the officer "do not suffer the debtor to regain actual possession, or exercise any acts of ownership over it, he may be considered as continuing in the constructive possession of the property;" and the jury are required to find, that the officer "never suffered it to go again into the possession of the debtor." The jury, under these directions, must have found such a continued possession of the plaintiff, as was necessary to the legal validity of the attachment.

If it was unnecessary for the jury to find the additional circumstances noticed by the judge—as that the officer caused the attachment to be generally and publicly known in the neighborhood; that the ore could not be taken away without his knowledge, etc.—the presentment of them in the charge, did but multiply the chances of success on the part of the defendants, and therefore, furnishes them with no just ground of complaint. Neither these, nor the testimony that the defendants knew of the attachment of the plaintiffs, had any tendency to corroborate the proof of the plaintiff's continued possession, or to establish any fact material to his recovery. We do not perceive that

those circumstances, in whatever light they are viewed, can furnish any reasonable ground for a new trial.

It is contended by the defendants, that as the plaintiff made no demand upon the executions for the ore which the defendants had taken from him, the lien by the attachments was lost, and the plaintiff divested of his right to the property. But the plaintiff's right of action accrued, and this suit was instituted, before judgment was rendered. The defendants took the property against the express prohibition of the plaintiff and with full knowledge of his rights. They continued to hold it wrongfully, after judgment was rendered; and still deny that he had any right to make demand of them. As between the plaintiff and themselves, the obligation lay on them to return the property, not on him to demand it.

For these reasons we advise the superior court that a new trial ought not to be granted.

In this opinion the other judges concurred.

New trial not to be granted.

THE DOCTRINE OF THE PRINCIPAL CASE as to the liability to an attaching officer of one who removes the property attached, is limited in *Sanford v. Pond*, 37 Conn. 595, by the qualification that such liability will only exist if the attaching officer is himself liable over to some third person for the property or its value. Thus he can not recover for such a removal if the attachment lien has expired prior to the institution of his suit, owing to the delay of the judgment debtor in suing out execution on his judgment.

THE RULE REQUIRING CONTINUED CHANGE OF POSSESSION to give validity to an attachment or sale of personal property, has been frequently recognized since in this state; the court also holds that the rule is one, not of evidence, but of policy: *Norton v. Doolittle*, 32 Conn. 410; *Colt v. Ives*, 31 Id. 36; *Kirtland v. Snow*, 20 Id. 28; *Crouch v. Carrier*, 16 Id. 510; *Ayres v. Husted*, 15 Id. 513; but personal property may be lawfully attached without removal, where the officer takes and retains the actual and exclusive possession: *Pond v. Skidmore*, 40 Id. 222.

POSSESSION IS SUFFICIENT TO PRESERVE an attachment lien, if the officer retain control over the property attached: *Hemmenway v. Wheeler*, 25 Am. Dec. 411, and note.

PHENIX BANK OF NEW YORK v. CURTIS.

[14 CONNECTICUT, 437.]

GENERAL ISSUE IN AN ACTION BROUGHT BY A CORPORATION admits the capacity of the plaintiff to sue.

GENERAL ISSUE TO AN ACTION BY A CORPORATION does not admit the capacity of the corporation to make the contract upon which it sues; and therefore unless the charter of the corporation is one of which the court will take judicial notice, it must be exhibited to show the powers of the corporation.

ASSUMPT against the indorser of a promissory note. The general issue was pleaded. Upon the closing argument on the part of the defense, counsel asked the court to instruct the jury that plaintiff could not recover unless it had made proof that it was a corporation endowed with power to sue as alleged in the declaration. No such proof had been made on the trial. Church, J., before whom the case was tried, refused to so instruct the jury, who found for plaintiff. Defendant moved for a new trial.

C. F. Cleveland and Hovey, in behalf of the motion.

Strong and G. Perkins, *contra*.

WILLIAMS, C. J. The plaintiff claims, that under the general issue, the defendant could not take the objection, that the existence of the plaintiffs as a corporation was not proved; and if it could be, it was here taken too late in the trial. As to the last point. If the plaintiffs are bound to prove their corporate powers, it is not easy to see why the defendant might not, at any time in the course of the trial, show to the court and jury, that they had failed to do this. Why may he not wait and see whether the plaintiffs have produced all the proof necessary to make out their case, and if not, call upon the court to say, that for want of such proof, they can not recover? An omission by the counsel who first addressed the jury for the defendant, to press the point, could no more prove a waiver of it, than if he had omitted to notice that the indorsement was not proved. If through mistake or accident, or because it was supposed to be conceded, the plaintiffs omitted to produce the evidence they possessed, the court would probably have permitted it to be done at a late hour, to prevent injustice. But after the plaintiffs have adduced all the evidence they have, and yet have omitted a point which is material, we know no rule of law or of the court, which will prevent the defendant's counsel from pointing out such omission to the jury. Indeed, upon the general issue, this is the usual mode of defense. By this delay, therefore, the defendant is not deprived of the benefit of his objection.

The great question however, is, whether the defendant, by his plea of the general issue, is not precluded from making the objection. Under this, two questions may arise: 1. Does the defendant, by this plea, admit the capacity of the plaintiffs to sue? 2. If he does, does he also admit the power of the plaintiffs to make the contract upon which they sue?

1. It was held very early, in the state of Massachusetts, that

under this plea the defendant could not deny the existence of the corporation: *Monumoi Great Beach v. Rogers*, 1 Mass. 159; *Kennebeck Purchase v. Call*, Id. 483, 485. And it is there a well-settled principle, that pleading over to the merits admits the capacity of the plaintiff: *Sutton First Parish v. Cole*, 3 Pick. 232, 245. And the courts of the state of Maine have pursued the same course: *Penobscot Boom Corporation v. Lamson et al.*, 4 Shep. 224 [33 Am. Dec. 656]. In Vermont similar decisions have been made: *Bank of Manchester v. Allen*, 11 Vt. 302. In New Hampshire, it is said, that the general issue is a waiver of all exceptions to the persons of the plaintiff: *School District v. Blaisdell*, 6 N. H. 197; *Concord v. McIntire*, Id. 527. In Alabama, it has been held, that by pleading to the merits, the defendant admits the capacity of the plaintiffs to sue: *Prime v. Garret*, Ala. (N. S.) 24.¹ In Ohio too, it has been decided, that the general issue admits the capacity of the plaintiffs to sue: *Methodist Episcopal Church of Cincinnati v. Wood*, 5 Ham. 286.

The supreme court of the United States have also repeatedly decided, that by pleading to the merits, the defendant necessarily admitted the capacity of the plaintiffs to sue: *Conrad v. The Atlantic Insurance Company*, 1 Pet. 387, 450; *Society for the Propagation of the Gospel v. Pawlet*, 4 Pet. 480, 501; *Yeaton v. Linn*, 5 Pet. 224, 231. In the state of New York, it is said, however, that under the general issue the plaintiffs must show, that they had a legal existence and a capacity to sue: *Bank of Ulica v. Smalley*, 2 Cow. 780 [14 Am. Dec. 526]. But highly as we respect the courts of that state, in view of the authorities cited, and in analogy to decisions in case of administrators, whose capacity to sue can not be questioned under this plea (11 Mass. 314,² 3 Day, 303³), we hold, that the capacity of the plaintiffs to sue can not be questioned in this stage of the pleadings.

2. But if the right of the plaintiffs to sue is admitted, another question arises, whether they must not prove, by their act of incorporation, or in some other way, what rights and powers are vested in them, not to prove that they may sue, but to prove that they could enter into the contract upon which they sued. It is to be recollected, that the plaintiffs claim to be incorporated in another state, and thus stand upon the same ground as foreign corporations. No notice, therefore, need be taken of cases where it has been held, that no proof was necessary, because the acts were of a public nature and must be noticed by

1. *Prim v. Davis*, 2 Ala. 24.

2. *Langdon v. Potter*.

3. *Chaplin v. Tilley*.

the court; as in *Whittington v. Farmers Bank*, 5 Har. & J. 489; *Dutchess Cotton Manufactory v. Davis*, 14 Johns. 245 [7 Am. Dec. 459]; 10 Mass. 92.¹ In the state of New York, this question has been repeatedly decided, so that the law there is settled beyond controversy; and although the plaintiffs need not set out their act of incorporation, yet, under the general issue, they must produce it: *Jackson v. Plumb*, 8 Johns. 378; *Bank of Utica v. Smalley*, 2 Cow. 778 [14 Am. Dec. 526]; *Bank of Auburn v. Weed et al.*, 19 Johns. 300, 303; *Bill v. The Fourth Great Western Turnpike Road*, 14 Id. 416; *Bank of Michigan v. Williams*, 5 Wend. 482, 483; S. C. in error, 7 Wend. 541; *United States Bank v. Stearns*, 15 Id. 314.

The same is held as law in Virginia; and while the right of a foreign corporation to sue is admitted, they hold, that they need not aver the incorporation in the declaration, but it may be put in issue, by the defendant, or the question may be raised upon the general issue: *Rees v. Conococheague Bank*, 5 Rand. 326 [16 Am. Dec. 755]; *Taylor v. Bank of Alexandria*, 4 Leigh, 475.² In Maryland, it is also decided, that a corporation of another state must, under the general issue, prove its corporate powers: *Agnew v. Bank of Gettysburg*, 2 Har. & G. 479. In Mississippi, they say, a corporation assume to sue in an artificial character: it is necessary that they sustain their allegations by proof: *Carmichael v. Trustees of School Lands*, 3 How. 98. A similar doctrine is said to be held in Illinois: *Hargrave et al. v. Bank of Illinois*, 1 Breese, 84, 86. In New Hampshire, it is said by Woodbury, J., that where the plaintiffs sue as a corporation, and the general issue is pleaded, they may still be required to prove their incorporation: *Society for the Propagation of the Gospel v. Young*, 2 N. H. 310. And if this general doctrine is impaired, by after decisions, still it is held as it respects foreign corporations: *School District v. Blaisdell*, 6 N. H. 197. In North Carolina, it has also been held, that on this issue, the plaintiffs must show themselves a corporation: 1 Dev. & Bat. 309.³ And in Pennsylvania, the distinction between the capacity to sue and the right to contract is recognized: *Wolf v. Goddard*, 9 Watts, 555.

Such is the course of authorities in this country. It is said, however, that a different decision has been made in Kentucky. An expression is also used, by Story, J., in one of the opinions before cited, which requires to be noticed. After observing, that the point raised, is not so much whether the plaintiffs are

1. *Portsmouth Livery Co. v. Watson*.

2. 5 Leigh.

3. *Turnpike Co. v. McCaeson*.

entitled to sue generally as a corporation, as whether they have shown a right to hold lands, he adds, that the general issue admits not only the competency of the plaintiffs to sue, but to sue in the particular action which they bring; and then goes on to show, that in the case before the court, there was abundant evidence to establish the right of the corporation to hold the land in controversy: *Society for the Propagation of the Gospel v. Pawlet*, 4 Pet. 501, 503. If, as we suppose, the judge means to say, that the plea admits that the plaintiffs can sustain an action of ejectment, there is no intimation that therefore they are not bound to show their corporate powers to hold the land in question. We have no idea that the supreme court of the United States intended to dispose of the question before us, in this summary way—a question, too, which, it was well known, had been solemnly settled differently, by a court of which one of the supreme court of the United States then constituted a part. Besides, the judge goes on to point out the several acts shown, admitting the existence of the corporation and its capacity to take the very land in controversy: 4 Pet. 502.

Believing, then, the American cases to be nearly uniform upon this point, let us look at the English authorities. *Norris v. Staps*, Hob. 210, was a suit for a penalty upon a by-law. The court said, the plaintiffs need not show how the corporation were incorporated, i. e., in his declaration; for the name argues a corporation, and the plea *nil debet*, or the like, requires proof of it. The case of *The Mayor and Burgesses of Lynne Regis*, 10 Co. 120, was an action of debt upon a bond, and the plea was *non est factum*. The defense rested entirely upon some trifling variation between the name by which the plaintiffs were described in the bond, and the name in the act of incorporation. If the claim of the plaintiffs here is correct, we see not why the plaintiffs there should have exhibited their acts of incorporation at all, or if they did, why the questions made should have arisen, if the plea of the defendant was a waiver of any such proof. In a later case, where the suit was brought by a foreign corporation, it was claimed, that they could not sustain a suit in England, and if they could, their name must be set forth, and how constituted or privileged. The last claim was met, by eminent counsel, by saying, that they need not show how they were incorporated, but upon the general issue pleaded, they must prove they were a corporation: *Henriques et al. v. Dutch West India Company*, 2 Ld. Raym. 1532, 1535. And a late reporter tells us, in a note, that Lord King, who tried that cause, declared,

that he held the company bound to prove, by proper evidence, that they were an authorized company, in their own country.

And in the note in the index to the case in *Ld. Raym.*, it is said, if a pretended corporation sue, and they are no corporation, the defendant may have the benefit of it, upon the general issue. And in a modern case, a copy of a charter of the king of Spain was introduced to prove the corporate rights of the plaintiffs; and in his marginal note, the reporter says, a corporation in a foreign country may sue, as such, in the courts of this country; but they must prove they are incorporated in that country: *The National Bank of St. Charles v. De Bernales*, 1 Car. & P. 569. And if these are to be considered as dicta, or admissions of counsel, or loose notes, they seem at least to show a uniform current of opinion from the days of Lord Hobart to the present time, upon this question in England.

And why should it be otherwise? The plaintiffs here allege, that they are incorporated, by the laws of another state or country; and that the defendant contracted with them, in that character. The defendant, by his plea, calls upon the plaintiffs to prove the facts, and all the material facts, in their declaration. It might seem at first view, says Chitty, as if the defendant, by his plea, only denied his having made the promise, as the definition of a contract is an agreement, founded on a sufficient and legal consideration, to do some legal act, or to omit the doing of an act, the performance of which the law does not enjoin. The above plea, by denying the contract, in effect puts in issue every part of the above definition, viz., the agreement, etc.: 1 Chit. Pl. 469. The question, says another author, on such issue, is, whether the defendant is indebted to the plaintiff; or whether he is liable to the plaintiff, as he, in his declaration, has alleged: Stev. Pl. 508.

Here the plaintiffs claim, that the defendant entered into a contract with them, which he has violated. It would seem then, of course, that they must prove the contract. The exhibition and proof of the note and indorsement, would, in ordinary cases, be sufficient; as in case of a natural person, there would be sufficient *prima facie* evidence of a power to contract. But is it so in case of a corporation? We have decided, that it has no natural rights, and none but such as its charter confers; that it is the mere creature of the charter: *New York Firemen Insurance Company v. Ely et al.*, 5 Conn. 556 [13 Am. Dec. 100]. How, then, can this court know what powers or privileges the charter of this company confers? When the defendant, by

his plea, denies the contract, it would seem, that he denies every part of it; and when we can not recognize the plaintiffs as a natural person, they having declared under an act of incorporation; when we can not recognize them as a corporation known to our law, they having declared upon an incorporation by a foreign legislature; what is there by which we can see or know that this contract was made with a person who had authority to make it? We proceed upon the ground that the defendant has admitted the plaintiffs' right to sue; yet unless he has also admitted their authority to make contracts, and all contracts, we think, that by all the rules of evidence the plaintiffs must prove it. The court certainly can not know what powers a foreign legislature have granted to a company of its citizens, except it be proved, as all foreign laws must be. Can it be said, that the name argues the power, as it was said by Lord Hobart, the name argues a corporation? The name, indeed, argues a bank; but unless it is a necessary incident of a bank, to take notes, it must be very slight evidence. Is it said, that the defendant, by making a contract with the plaintiffs, by this name, has admitted they were a corporation? The defendant might have made this contract with individuals who assumed this name and style, as well whether they were a corporation or not: *The Utica Bank v. Stevens*,¹ 15 Wend. 316. And that the defendant is not estopped by this, is well settled in New York: *Welland Canal Company v. Hathaway*, 8 Wend. 480 [24 Am. Dec. 51]; *Williams v. The Bank of Michigan*, 7 Id. 541. And in the cases which have come before this court of foreign corporations, the plaintiffs have exhibited their charters as evidence of their powers: *New York Firemen Insurance Company v. Ely*, 5 Conn. 550-574 [13 Am. Dec. 100]; *Philadelphia Loan Company v. Twiner*, 13 Id. 249.

We regret to send back a case where we have no reason to doubt that the evidence existed, but was omitted to be presented. We regret too, that we had not the benefit of consulting with the judge, who tried the cause in the court below, before we came to this result. But, upon the best consideration we can give to the case, we think a new trial must be granted.

In this opinion the other judges concurred, except CHURCH, J., who was absent, and WARRE, J., who declined giving any opinion.

New trial to be granted.

1. *United States Bank v. Stearns*.

GENERAL ISSUE PLEADED TO AN ACTION BY A CORPORATION does not excuse it from proving its incorporation: *Bank of Utica v. Smalley*, 14 Am. Dec. 626; *Vernon Society v. Hills*, 16 Id. 429; *Welland Canal Co. v. Hathaway*, 24 Id. 51; but see *contra*, *Penobscot Boom Corp. v. Lamson*, 33 Id. 656, and *Lehigh Bridge Co. v. Lehigh C. & N. Co.*, 26 Id. 511.

WHITING v. STATE.

[14 CONNECTICUT, 487.]

INFORMATION FOR A STATUTORY OFFENSE is in general sufficiently definite and certain, if in the description of the offense it follow the words of the statute.

IDEM.—IN AN INFORMATION FOR THE SALE OF SPIRITUOUS LIQUORS, it is not necessary to state the amount, kind, or value of the liquor sold, unless the jurisdiction, or the nature or degree of the punishment, depends upon a consideration of these matters.

INFORMATION, in the county court, for the sale of spirituous liquors. The information charged "that said Adna Whiting heretofore, to wit, on, etc., at said Farmington, sell spirituous liquors to one Edward S. Russell, without liberty granted by said town of Farmington, against the peace, and contrary to the statute in such case provided." The defendant was convicted, and moved in arrest of judgment for the insufficiency of the information. The motion was overruled, whereupon defendant sued out a writ of error in the superior court. The case was reserved for the opinion of this court.

Trucey and Chapman, for the plaintiff.

T. C. Perkins, for the state.

STORRS, J. The questions in this case arise upon exceptions taken to the sufficiency of the information, which is founded on the act of 1839, prescribing that no person or persons shall "sell, directly or indirectly, any wines or spirituous liquors in any town in this state, without liberty granted by the town," as is provided in said act under the penalty therein mentioned. The defendant claims that the information is defective, first, because the facts alleged in it as constituting the charge are stated too generally, and not with that certainty or particularity which the law requires; for that neither the kind nor quantity of liquor sold by the defendant, is set forth. If this were an information for an offense at common law, it would admit of a serious doubt whether the charge is set forth with that certainty which is required in such cases. It would certainly be difficult to uphold it, by the precedents. But it

is clear from an inspection of those precedents, that indictments and informations for offenses at common law are framed with more particularity, and that the facts are stated in them with more minuteness, than in those for mere statutory offenses; and especially for statute offenses which amount only to misdemeanors, where less strictness is tolerated than for felonies. These precedents furnish illustrations of the rule as to the certainty which is requisite, and are to be considered as guides in similar and analogous cases. For, although the reasons upon which the strictness and nicety with which indictments at common law are framed (and it must be admitted that an extreme of refinement has sometimes prevailed), are not always very obvious, or may have ceased to exist; and it may be, as indeed it has been, matter of regret that so great particularity has been required; yet, as they have been so long and authoritatively established, it would not probably be considered safe or proper for courts now to relax from this strictness. There has, however, been manifested by the courts more recently a strong disposition not only not to extend, but to dispense with a minuteness, for which no sensible reason can be given, and which appears to be unnecessary to a fair administration of justice.

The present is an information for an offense created by statute. In regard to such offenses it is a well-settled general rule that it is sufficient to describe them in the words of the statute: *The United States v. Gooding*, 12 Wheat. 460; *The United States v. Mills*, 7 Pet. 138, 142. To this rule there are, indeed, some exceptions, and in some instances greater particularity is required, from the obvious intention of the legislature, or the known principles of law. It is for the defendant to show that the present case falls within those exceptions.

In this we think that he has not succeeded. He has relied on those cases at common law where the ancient strictness, as applicable to those cases, is required, and claims that this does not fall within any of those classes of cases which form an exception to that strictness; whereas, this being an information for a statutory offense, where the general rule is, that it may be described in the words of the statute, it is for him to show, that it falls within those cases, or the principle of them, where greater particularity is required. In this case, the language of the statute on which the information is founded, is pursued. The charge, therefore, is as particular as the statute; and we can see no good reason why a greater particularity should be required. The act neither specifies the kind, nor the quantity, of

spirituous liquors, which must be sold to constitute the offense. There seems to be no more reason why the kind of spirit should be mentioned, than if it was an information, on the same statute, for selling wine, the particular kind should be set forth—a minuteness of description which would hardly be contended for. The sale of any quantity, or of any kind, constitutes the offense; and this is cognizable by one court only. If the jurisdiction of the court, or the nature or degree of the punishment, depended on either the kind or quantity, the case might be different. In several of the cases cited by the defendant, in which it was held to be necessary to specify quantity, the reason given was, that the court might be enabled to fix the punishment: *Rex v. Sparling*, 1 Stra. 497. On an indictment, however, for taking carps out of one's pond, where the offender was to be fined at the discretion of the court, it was held, that the number taken need not be stated: *Vin. Abr.*, tit. Indictment, M. 21; *Rex v. Wetwang*, 1 Lev. 203.

The conclusion to which we have arrived on this point, accords with the decisions in other states, on similar statutes, in one of which this precise objection was overruled: *The Commonwealth v. Odlin*, 23 Pick. 275, 279; *The Commonwealth v. Thurlow*, 24 Id. 374; *The Commonwealth v. Clapp*, 5 Id. 41; *The Commonwealth v. Hooper*, Id. 42; *The People v. Adams*, 17 Wend. 475. It is also claimed, that this information is defective, in not stating the value of the liquor sold. This objection is unsupported by reason or authority. It is uniformly and explicitly laid down, that an averment of the value is unnecessary, excepting where it determines the jurisdiction or the punishment: as, for example, in larceny at common law, where the value of the goods stolen constitutes it either grand or petit larceny, a felony or a misdemeanor; or, under our statutes, where it affects the jurisdiction of the court, as well as the punishment.

The remaining objection to the information, is, that it merely states a sale by the defendant, without specifying its particular terms, or the delivery of the thing sold. It is claimed, that it does not appear, that there has been a violation of the statute; for that it is not every sale or contract of sale, which constitutes an offense; and it should, therefore, appear to be such a sale as the statute contemplates. Instances have been put where a contract may be made in one town for the sale of liquor which is in another; and it is said, that in the present case, the liquor sold may have been in another town, or may have been agreed to be delivered in another town, than that in which the

offense is alleged to have been committed; and therefore, that the statute may not have been violated. Without deciding whether, in the cases supposed, the law is violated, we think, that the information, in this respect, since it follows the terms of the statute, is sufficiently precise. It would be insisting on an unreasonable particularity to require that the whole of the terms of the contract, and the location of the subject-matter of it, should be minutely set forth. No such particularity is observed in any of the precedents in similar cases; it would be extremely inconvenient in practice; it would require the pleader to state what it would be very difficult, if not impossible, for him to ascertain; it would tend to no useful purpose; and it is a matter which may, more properly, and with entire safety to the accused, be left to be determined from the evidence, whether the facts are such as to bring the sale within the true meaning of the prohibition contained in the statute: 12 Wheat. 460.

The superior court should, therefore, be advised, that there is no error in the judgment complained of.

In this opinion the other judges concurred.

Judgment affirmed.

AN INFORMATION FOR A STATUTORY MISDEMEANOR is not governed by the rules that apply to an indictment for a common law offense; as respects the certainty and particularity with which it must be framed, much less strictness is tolerated: *Barth v. State*, 18 Conn. 439; *State v. Corrigan*, 24 Id. 289. In *State v. Miller*, Id. 527, the objection urged against the complaint preferred by the grand juror, upon which a conviction was had of the offense of selling spirituous liquors, was that it did not state the quantity or kind of spirituous liquors which were sold; but the objection was overruled upon the authority, among others, of the principal case. It is also held in Connecticut, that a complaint by a town grand juror, being a prosecuting officer unknown to the common law, is therefore not subject to the technical rules applied to common law modes of prosecution, and that all that is necessary in such a complaint, is that it shall be reasonably certain and definite in its specifications of crimes: *Rawson v. State*, 19 Id. 297; *State v. Miller*, 24 Id. 521; *State v. Holmes*, 28 Id. 232; all citing the principal case.

INDICTMENT FOR A STATUTORY OFFENSE should follow the words of the statute: *Hess v. State*, 22 Am. Dec. 767.

BIGELOW v. HARTFORD BRIDGE COMPANY ET AL.

[14 CONNECTICUT, 565.]

BILL IN EQUITY FOR AN INJUNCTION AGAINST A PUBLIC NUISANCE will not be entertained unless it shows that the plaintiff will sustain a special or peculiar damage from it, an injury distinct from that done to the public at large.

INJUNCTION WILL NOT BE GRANTED unless the violation of plaintiff's rights which it is sought to enjoin is such as is or will be attended with actual and serious damage. Where the damage that will be done is very small, no injunction will be granted, even though an action at law might lie.

INJUNCTION WILL NOT BE GRANTED AGAINST AN INJURY which neither exists nor is threatened by defendant, but which plaintiff apprehends may be brought about by future acts of the defendant, if those which he seeks to enjoin are not prevented.

BILL for an injunction. In the month of January, 1841, a causeway existed, beginning at the bridge of the corporation defendant on the Connecticut river and extending through the East Hartford meadows. This causeway was erected by the corporation conformably to the requirements of its charter and of an act amendatory thereto, passed with its consent, by the general assembly in the year 1825. Four hundred feet of the causeway as it then existed consisted of bridging, being intended for a channel for the waters of the Connecticut river that might overflow its banks at points above the causeway and pass down the meadows through which the causeway extended; and also as a channel for large quantities of the water of the Connecticut river which were emptied into the meadows north of the causeway, by certain ravines leading from the river, and which began to carry water, before the river had attained such a height that it overflowed its banks. In the month of January, 1841, an extraordinary flood in the Connecticut river washed away and destroyed the bridging previously mentioned, and which went by the name of the "dry bridge," and also the ends of the causeway adjoining thereto. The corporation in the month of May of the same year obtained the general assembly to pass the following resolution: "That in repairing and rebuilding the causeway between the towns of Hartford and East Hartford, the Hartford bridge company may, and they are hereby authorized to, rebuild the same permanently of stone; provided they leave such sluices for back-water as shall, in the opinions of Eli Whitney Blake and Henry Farnham, of New Haven, and Roswell B. Mason, of Bridgeport (who are hereby appointed a committee for that purpose), be equivalent to the bridging required by the existing provisions of law; and provided said causeway be rebuilt to the acceptance of said committee." The corporation applied to the committee mentioned in the resolution to ascertain what in their opinion and judgment was required of it by the above resolution, in the rebuilding of its causeway, and as to what mode of rebuilding and repair

would be acceptable to them. The committee made an examination of the ground, and after mature consideration returned an answer. The committee was of opinion that the length of the "dry bridge" bore such a small proportion to the whole section of the stream at times of flood, that its filling with solid masonry work would have a scarcely appreciable effect in raising the level of the water at such times. The committee then continued: "If in filling up this space, the mason-work, together with the adjoining ends of the present causeway, were left one and a half or two feet lower than the dry bridge was, the effect of this depression, to prevent a contraction of the stream by an accumulation of ice at that point, would, in the opinion of the committee, fully counterbalance the impediment which the mason-work itself would present to the flowing of the water. Entertaining these views, the committee would deem it necessary only to leave a sufficient amount of sluiceway through the mason work to permit the waters to subside from the flats above after a flood as the main stream subsides; and for this purpose, they would consider three semicircular culverts of twenty feet span each, sufficient." The committee concluded their report by saying that the construction of the resolution under which they acted was doubtful; but that in their opinion the legislature intended merely to guard against such a reconstruction of the bridge as would expose adjoining property to greater damage by flood, than that to which it stood exposed prior to the destruction of the dry bridge; and that if the bridge was rebuilt in the manner indicated above, they would feel bound to accept it, as being in their opinion equivalent, in point of security to the adjoining property, to the construction previously existing. The company upon receipt of this communication proceeded to act upon it and to fill in the space formerly occupied by the dry bridge with solid mason-work, leaving therein, however, four semicircular culverts of twenty feet span each, instead of the three recommended by the committee. And, moreover, the level of the mason-work was left at least one and a half feet lower than the level of the dry bridge. At the time this bill was filed, the mason-work to occupy the place formerly covered by the dry bridge was complete, but that part of the causeway adjoining the ends of the dry bridge, and which had been washed away, was not yet repaired. The bill stated that the committee had erroneously construed the resolution under which they acted, in regard to the amount of sluiceway required by it for back-water, and that they had also misconstrued it in reference

to the height to which the causeway should be raised. That the effect of the causeway as it was being built would be to dam up the waters, formerly accustomed to flow under the dry bridge, and so cause the floods of the river to be of greater height, and that it would expose the property and dwelling-house of plaintiff, which lay adjoining and north of the causeway, to more frequent inundations, and to inundations of greater depth and duration, and would cause them to be in imminent danger of being washed away by the floods and ice of the river; and that owing to the depression in the causeway the difficulty and danger of passage thereon would be much increased. The bill also further alleged that the danger to which plaintiff's property was exposed by reason of the causeway was shared by the other property north of the causeway. The bill sought an injunction against the further construction of the causeway, in pursuance of the plan proposed by the committee, and to enjoin the removal of the work already done, and to enjoin the committee, who were made defendants, from authorizing or accepting the work when accomplished. The court below found, that the danger of destruction of the buildings upon plaintiff's land, by the floods of the river, would not be increased by reason of the erection of the causeway in the manner proposed by the committee, and that the increase of damage occasioned thereby to the property would be slight. The court found, however, that if the causeway in the place where formerly existed the dry bridge, instead of being left one foot and a half below its level, were raised to that level, the damage to the adjoining property in cases of flood would be much greater, and the danger to which the buildings on plaintiff's land would be exposed of being destroyed by the water and ice coming down in times of flood would be much increased. Upon these facts, and others which appear in the opinion, the case was reserved for the advice and consideration of this court.

Thucey and Chapman, for the plaintiff.

Parsons, *contra*.

STORES, J. This bill can not be sustained merely on the ground that the difficulty and danger of traveling on said causeway will be increased by the greater depth and more rapid flow of the water which will be occasioned by the contemplated acts of the Hartford bridge company, and that therefore said acts will constitute a public nuisance. It is very clear that a bill in equity will not be entertained for an injunction against

a public nuisance, unless it shows that the plaintiff will sustain a special or peculiar damage from it, an injury distinct from that done to the public at large. In *Spencer v. The London and Birmingham Railway Company*, 8 Sim. 189, 11 Cond. Eng. Ch. 390, the plaintiff averred not only that, by the excavation of the defendants in Granby street, the said street was impassable, and he was deprived of access from his hackney coach and livery establishment at a place called Granby News, through that street to the Hampstead road, but also stated such facts as showed that he thereby suffered a particular injury, and one different from that done to individuals in general. The vice-chancellor on that ground decided that the plaintiff had a special right, quite distinct from that of the public at large, and overruled the demurrer to the bill, which proceeded on the ground that the injury was a public nuisance, and therefore, that the relief prayed for ought to be sought by information at the suit of the attorney-general, and not by bill. In *Sampson v. Smith*, 8 Sim. 272; 11 Cond. Eng. Ch. 432, the plaintiff alleged that the body of the smoke which issued from the chimney of the defendant's steam-engine, and the blacks and soot mingled therewith, descended in such dense bodies into the street that the plaintiff's house and shop situated thereon, were filled therewith and his goods and furniture very much injured, and the health and comfort of himself and family very much impaired thereby, and that it was a grievous nuisance to the plaintiff, and also to the other inhabitants of that street and neighborhood. The bill was sustained on the ground of the special injury suffered by the plaintiff. Indeed, it is upon the ground of the particular injury to the plaintiff, distinct from that which he suffers in common with the rest of the public, that all the applications for injunctions against what is a public nuisance are sustained: *Crowder v. Tinkler*, 19 Ves. 617. And there is no good reason why, apart from such special injury, relief should be granted in this mode, at the instance of a particular individual. Courts of equity, in this respect, proceed on the principle which prevails in courts of law, that an action will not lie in respect of a public nuisance, unless the plaintiff has sustained a particular damage from it, and one not common to the public generally: Co. Litt. 56 a; *Williams' case*, 5 Co. 73; *Sir Thomas Earle's case*, Carth. 173, 176; *Chichester v. Lethbridge*, Willes, 71; *Robins v. Robins*, 1 Salk. 15; *Iveson v. Moore*, 1 Ld. Raym. 486, 491; *Rose et al. v. Miles*, 4 Mau. & Sel. 101; *Wilkes*

v. *Hungerford Market Company*, 2 Bing. (N. Cas.) 281; *Greasly v. Codling et al.*, 2 Bing. 263.

To preserve and enforce the rights of persons, as individuals, and not as members of the community at large, is the very object of all suits, both at law and in equity. The remedies which the law provides in cases where the rights of the public are effected, and especially in cases of public nuisance, are ample and appropriate; and to them recourse should be had, when such rights are violated. The courts of equity, in England, will indeed entertain informations, not by individuals, but at the suit of the attorney-general, or the proper crown officer, for the purpose of abating public nuisances, and what are termed purprestures. That mode of proceeding has been, however, hitherto unknown here; and whether it would be tolerated in any case, it is unnecessary to consider. The averment, that the acts contemplated by the bridge company will be injurious to the property of others besides the plaintiff may be disregarded; since the bill can not, consistently with any recognized principles, be brought on their behalf: 8 Sim. 272.

Having disposed of these topics, the question arises, whether the plaintiff has shown that there was such a particular and special injury meditated against him, or which he has reason to apprehend from the acts of the Hartford bridge company, that he was entitled to an injunction. And here the proof in the case relieves us from the necessity of examining minutely the principles and authorities applicable to bills for injunction founded on apprehended injuries, which have been so elaborately commented on, by the counsel. Of whatever character it is requisite that the injury complained of should be, in order to lay the foundation for this remedy, it is necessary that it should be a substantial, and not merely a technical, or inconsequential, injury. There must not only be a violation of the plaintiff's rights, but such a violation as is, or will be, attended with actual and serious damage. Even although the injury may be such that an action at law would lie for damages, it does not follow, that a court of equity would deem it proper to interpose, by the summary, peculiar, and extraordinary remedy of injunction: 8 Sim. 194. It is obviously not fit that the power of that court should be invoked, in this form, for every theoretical or speculative violation of one's rights. Such an exercise of it would not only be wide from the object of investing those courts with that power, but would render them engines of oppression and vexation, and bring them into merited odium. It is a power

which is extraordinary in its character, and to be exercised generally only in cases of necessity, or where other remedies may be inadequate, and even then with great discretion and carefulness. It is a salutary, and indeed a necessary power, when confined within those safe limits in which it has been exercised; but capable of being made an instrument of oppression, and therefore to be extended, if at all, with great circumspection: *Earl of Ripon v. Hobart*, 3 My. & K. 169; 1 Coop. Sel. Cas. 333; 8 Cond. Eng. Ch. 331, 469.

In this case, the plaintiff claims only, that his property shall be exposed to no greater danger of injury than it was before the destruction of the dry bridge, which rendered the rebuilding of the causeway, as contemplated by the Hartford bridge company, necessary. Of the causeway, up to the time of such destruction, there is here no complaint. On this subject, it is found, that the buildings on the land of the plaintiff, by the manner in which the bridge company are rebuilding the causeway, will be in no greater danger of being destroyed or carried away, by the floods in Connecticut river, whether ordinary or extraordinary, than before said dry bridge was destroyed; that, in times of high floods, the water will rise somewhat more rapidly and suddenly, and somewhat higher, north of the causeway, and continue longer, than it did previous to that event; but to what extent can not be ascertained by calculation, and is matter of opinion and conjecture; but not, in the opinion of the court, to such an extent as to injure the land or buildings of the plaintiff, in value, materially, or to an extent that can be appreciated or estimated; that the productiveness of the land will not be materially diminished; and that the decay and depreciation of the buildings, and the repairs and inconvenience that they will occasion, will be very small, and not such as will lessen materially the intrinsic value of said lands or buildings.

Assuming that the nature of the injury, in this case, is such, that, if it were sufficiently important in point of magnitude, it would warrant the interposition of the court by injunction, and that the existence of the danger is shown with such certainty that there would be no objection, on that ground, to granting the relief sought, we are clearly of opinion, without dwelling on the several particulars of the finding on this subject, that the extent of the damage to be apprehended in this case, is wholly insufficient to justify us in applying the peculiar and extraordinary remedy which is sought. The decay and depreciation of the property, the repairs which may be thereby rendered necessary, and the inconvenience which may ensue to the

plaintiff, are found to be very small, not capable of appreciation, and not such as will materially lessen the intrinsic value of the plaintiff's property. We find no precedent, and discover no reason, to warrant the granting of an injunction for an apprehension of injury of such inconsiderable magnitude.

The plaintiff, however, relying on the principles sanctioned in *Blackmore v. The Glamorganshire Canal Navigation*, 1 My. & K. 154; 6 Cond. Eng. Ch. 544, and the cases there cited, takes the ground that acts of the legislature, like that under which the Hartford bridge company are constructing the works in question, are, in the language of Lord Eldon, "to be regarded in the light of contracts made by the legislature on behalf of every person interested in the thing to be done under them;" that the acts, under which the said company are proceeding, form virtually a contract between the company and the neighboring proprietors; that the committee, in the present case, have misconstrued and exceeded their powers under those acts, and that the doings of the company are unauthorized; and that, therefore, irrespective of the extent of the injury which will be inflicted on the plaintiff, they should be restrained from exceeding their powers, on the principles upon which courts of equity will proceed in enforcing the specific execution of contracts. Without questioning this view of acts of that description, it may well be doubted whether the court would, under the circumstances of this case, grant the relief here sought, if it rested on a formal contract made between the parties; but there is no authority for believing that the equity courts in England would; and certainly we are not disposed to carry the analogy which may exist, for certain purposes, between such acts of the legislature and private contracts, to the wide, inconvenient, and unnecessary extent of furnishing the relief here sought, upon the ground of such supposed analogy, in favor of every member of the community, who may experience or have reason to fear a trifling inconvenience or an unsubstantial injury, from a departure, perhaps merely literal, from the provisions of such acts.

The plaintiff also claims, that he is entitled to relief on the ground that the Hartford bridge company are reducing their causeway below the height which their charter permits, and that they may be compelled to raise it to the height which it requires; in which case, as the court finds, the water will, with the reduced amount of sluiceway, be so raised as to expose the buildings of the plaintiff to great injury and destruction. It is not, however, found, that the company have depressed the causeway

below what the charter warrants; and if they had, and should be compelled to raise it, it is not to be presumed that they would, in that case, neglect to enlarge the outlet for the increased accumulation of water. The state of things which the plaintiff here supposes and apprehends, is not found to be meditated by the company; and it is proper to wait until it actually exists, or is threatened, before the requisite remedy shall be applied.

This view of the case supersedes the necessity of inquiring what is the true construction to be put on the resolution of the legislature of 1841, which is not unattended with difficulty; or whether the committee appointed by that resolution are properly made parties to this bill.

The superior court, for these reasons, should be advised that the bill ought to be dismissed.

In this opinion the other judges concurred, except WILLIAMS, C. J., who gave no opinion, being disqualified by interest in the event of the suit.

Bill dismissed.

BILL FOR AN INJUNCTION against a public nuisance will not be entertained at the suit of a private individual, unless it shows that the plaintiff will sustain a special or peculiar damage from it, an injury distinct from that done to the public at large: *O'Brien v. Norwich & W. R. R. Co.*, 17 Conn. 375; *Clark v. Saybrook*, 21 Id. 327; *Irwin v. Dixon*, 9 How. (U. S.) 28; *Norwich Gas Light Co. v. Norwich City Gas Co.*, 25 Conn. 36; *Cumberland Valley R. R. Co.'s Appeal*, 62 Pa. St. 227; *Buck Mountain Coal Co. v. Lehigh Coal and Nav. Co.*, 50 Id. 99; *Peterson v. Navy Yard etc. R. R. Co.*, 5 Phila. 201; *Shed v. Hawthorne*, 3 Neb. 185; *Dover v. Portsmouth Bridge*, 17 N. H. 215; *Allen v. Board*, 13 N. J. Eq. 74; *Hinchman v. Paterson H. R. R. Co.*, 17 Id. 79; *Doolittle v. Supervisors of Broome Co.*, 18 N. Y. 161; 16 How. Pr. 518. But the correlative of this proposition is true, and if the special injury is shown, an injunction will not be refused: *Falls Village Water Power Co. v. Tibbette*, 31 Conn. 169; *Frink v. Lawrence*, 20 Id. 120. The principle governing these cases, that the state is the proper party to enforce a remedy against a public wrong, was applied in *Craft v. Jackson Co.*, 5 Kan. 522, and an injunction sought by a taxpayer to restrain the county board from allowing a claim alleged to be illegal was denied, because the interest of complainant in obtaining such relief was but one common to all the taxpayers of the county.

THE DICTUM IN THE PRINCIPAL CASE, which doubts the jurisdiction of a court of equity to entertain an information at the instance of the attorney-general, to abate a public nuisance, is criticised and denied in *Attorney-general v. Railroad Companies*, 35 Wis. 535, where such jurisdiction was entertained. See, likewise, *State v. Saline Co. Court*, 51 Mo. 381. In all the foregoing cases *Bigelow v. Hartford Bridge Co.* is cited as authority.

AS TO WHEN INJUNCTIONS WILL BE GRANTED against a public nuisance, see *Rosser v. Randolph*, 31 Am. Dec. 712.

AN INVASION OF PLAINTIFF'S LEGAL RIGHTS is not a ground for an injunction unless it is accompanied with serious and substantial damage: *Bassett v. Salisbury Mfg. Co.*, 47 N. H. 439; *Lexington etc. Bank v. Guyan*, 6 Bush, *Thornton v. Grant*, 10 R. I. 46.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

DAVIS, AUDITOR OF PUBLIC ACCOUNTS, v. BURTON.

[3 SCAMMON, 41.]

PLEA OF NIL DEBT TO DEBT ON BOND, where the bond is the gist of the action and the recovery is of a sum *in numero*, is bad; otherwise, where the bond is merely inducement to the action.

PLEA OF NIL DEBT TO DEBT ON SHERIFF'S BOND is bad.

WHERE SEAL OR SCRRAWL IS NOT AFFIXED TO SOME OF THE NAMES of the obligors in a bond which indicates upon its face an intention to seal it, it will be presumed that those obligors against whose names no seals appear, adopted the seals affixed by the others, and all will be bound, but the presumption may be rebutted by plea and proof.

DEBT on bond. The case appears from the opinion.

J. Lamborn, attorney-general, for the plaintiff.

W. A. Minshall, for the defendants.

By Court, SCATES, J. This is an original action of debt, instituted by the plaintiff, against the defendants, securities of Thomas Haydon, sheriff of Schuyler county, for the recovery of the sum of ten thousand dollars, the penalty of his bond. The declaration avers that the defendants made their certain writing obligatory, sealed with their seals, and makes profert of the bond. The breach alleged is, in not paying over the sum of seven hundred and thirty-six dollars and twenty-five cents, which he received as sheriff, on the first day of March, 1838, as taxes on lands listed in said county, and lying in other counties in the state. The declaration also avers, that the clerk of the circuit court of said county, approved said bond, no circuit court being held within thirty days after he gave notice to the

said sheriff, of the receipt of his commission. There are five several pleas, upon all of which, except the second and third, there are issues to the country.

In the second plea, the defendant, Penny, pleaded *nil debet*. In the third plea, the defendants, Fellows, McCutcheon, Richardson, Campbell, Warren, Snider, Randall, Wells, and Penny pleaded that "Thomas Haydon, by virtue of his office, as sheriff, did not collect any taxes in Schuyler county, between the time of the execution of the writing obligatory declared on, and the end of the next term of the Schuyler circuit court; and that said writing obligatory was never presented to, or approved by, the judge of the Schuyler circuit court." To these two pleas, the plaintiff demurred generally. The question arising upon the demurrer to the third plea, is settled by the resolution of the court in the case of *Davis v. Haydon et al.*, decided at this term: 3 Scam. 35. The demurrer to the second plea, questions the sufficiency of a plea of *nil debet* to debt on bond. Where the bond is the gist of the action, and the recovery is of a sum in *numero*, such a plea is bad; but where it is merely inducement to the action, the plea is good: 1 Chit. Pl. 423. In this case, the recovery will be ten thousand dollars; to be satisfied as to the plaintiff by the payment of such damages as may be assessed upon the breach assigned; and the judgment will stand as a security for such damages as may be assessed upon such other breaches as may be assigned by any other person interested: R. L. 490, sec. 16; Gale's Stat. 532. If the averment in the declaration be true, that the defendants signed and sealed the writing, the plea is not admissible. Upon examination of the bond, there appear seventeen obligors, and only fifteen scrawls set for seals. There is no scrawl set opposite the name of defendant, Penny. Is it then his deed? If it is, his plea is insufficient.

In the case of *Byers v. McClanahan*,¹ 6 Gill & J. 250, it was held that a piece of blank paper signed by a party over whose signature a bond is afterwards written, and shown to him, will be obligatory, if he does not repudiate it at the time. In Comyn's Digest, title Fait, 272, 273, it is said: "If there be mutual covenants between A. and B., of the one part, and C. and D., of the other, and B. does not seal; yet covenant lies by him against C. and D., upon this deed; for he is made a party to the deed, and and C. and D. covenanted with him." In Sheppard's Touchstone, 56, it is laid down, that "If there be twenty to seal one deed, and they all seal with one piece of wax, and with one seal,

1. *Byers v. McClanahan*.

yet, if they make distinct and several prints, this is very sufficient sealing, and the deed is good enough." In the case of *McKay et al. v. Bloodgood*, 9 Johns. 284, in debt on bond, it was held, that where one partner signs a bond in the name of the firm, and affixes one seal, it will bind the other, who saw and approved it before the signing and sealing, but who was not present when done. It has always been held, that one piece of wax may serve for several obligors, and that one may seal for another: *Perk.*, sec. 134.

In the *Case of Lord Lovelace*, Sir W. Jones, 268, it was admitted by the prosecution, that "If one of the officers of the forest put one seal to the rolls, by consent of all the verderers, regards, and other officers, it is as good as if every one had put his several seal; as in case divers men enter into one obligation, and they all consent and put but one seal to it, it is a good obligation of them all." It was held in the case of *Ball v. Dunster-ville*, 4 T. R. 313, that if one partner in a transaction seal a deed with one seal for himself and partner, with his consent, and in his presence, it is a good execution of the deed for both. This is acknowledged to be the rule in the case of *Ludlow et al. v. Simond*, 2 Cai. Cas. 1, 42, 55 [2 Am. Dec. 291]. It is also laid down in 1 Ph. Ev. 416.

The case of *Hatch v. Crawford, Adm'r*, 2 Port. 54, is in point. It was an action of assumpsit upon a written agreement, which concluded: "Given under our hands and seals." One signed and sealed, and immediately below his name, the other signed, but made no separate seal; plea, the general issue. The court below excluded this instrument from being read as evidence under the issue, in that form of action, on the ground that it was the deed of both. The supreme court affirmed that decision. Chief Justice Saffold, after reviewing the authorities in Comyn, and Sheppard's Touchstone, remarked: "It is true, the cases here given are slightly different from the one under consideration; but they are to be regarded only as instances of informality which affect not the validity of the instrument; they do not prove that there can be no other irregularities of execution, which are equally immaterial;" and concludes: "In relation to the case before us, it may be remarked, that the circumstance of the instrument's having expressed the intention of both parties to execute it under their hands and seals; of its having contained mutual stipulations, binding both, and of its having been signed and sealed by the party of the first part; then the execution at the same time by the other party, is a sufficient indication

of the intention of the second party to execute it according to its import, and to bind himself with the same solemnity that he received the obligation of the other party. In legal contemplation, he is presumed, instead of affixing a second seal, to have adopted the one already annexed."

From the character of this instrument, purporting upon its face to be given under the hands and seals of the defendants, conditioned for the performance of official duties; being required by law to be under the seal or scrawl of the obligors; from the number of seals annexed, are we to presume that the defendant, Penny, signed it in bad faith towards, and intending to deceive the principals and the obligees, by omitting to set a separate seal? Or shall we presume that he signed *bona fide*, with the intention of becoming bound, and that in omitting to annex a separate seal for himself, he intended to adopt one already affixed? In reviewing these authorities upon the doctrine of seals, on questions the most analogous to the one before us, of any we can find, we see a steady and progressive relaxation of the ancient and strict doctrine on this question. We find no ancient decision at the common law in point. Those most apposite are of more modern date; and the one in point in Alabama, is of recent date. Without authority in point at the common law, we feel disposed to lay down such a rule as will be consonant to reason and justice, and comport with the obvious intention of the parties. We will look to the intention of the parties, as set out in their writing, for its character and dignity, if there be but one seal or scrawl to authorize our view.

We feel warranted, by common sense, by justice and sound reason, as well as by the principles of law, to presume that all the signers of an instrument indicating, upon its face, an intention to seal it, adopted any seal or scrawl that may be annexed to the name of one. The obligors will be left to rebut that presumption, by plea and issue. It is, therefore, considered that the law is with the plaintiff.

Demurrer sustained.

SEALING OF INSTRUMENT, AND WHAT CONSTITUTES SUFFICIENT SEAL: See *Austin v. Whitlock*, 4 Am. Dec. 550; *Perrine v. Cheeseman*, 19 Id. 388; *Cromwell v. Tate's Ex'r*, 30 Id. 506; *Grimsley v. Riley's Adm'rs*, 32 Id. 319, and note. One seal may serve for all the signers of an instrument; it is not necessary to have as many separate seals as there are obligors: *Pequawockt Bridge v. Mathes*, 26 Id. 737. So held also in *McLean v. Wilson*, 3 Scam. 51; and *Witter v. McNeil*, Id. 436, citing *Davis v. Burton*.

SMITH v. EAMES.

[3 SCAMMON, 76.]

JUROR HAVING FORMED DECIDED OPINION, which is positive and not hypothetical, upon the merits of the case, either from personal knowledge, from statements of witnesses or of parties, or from rumor, which opinion will probably prevent him from giving an impartial verdict, is subject to challenge for cause.

LAGET, TRANSIENT, OR HYPOTHETICAL OPINION FORMED BY JUROR, which may be changed, and which does not show a conviction of the mind and a fixed conclusion upon the case, is not a good ground of challenge; and a full examination may be allowed if necessary to ascertain the state of the juror's mind.

OPINION FORMED BY JUROR FROM RUMOR as to which party in the case ought to succeed, where he states on his examination that he still retains that opinion if what he has heard is true, but is not asked as to whether or not he believes it to be true, is not a good ground of challenge.

AFFIDAVITS OF JURORS TO IMPEACH THEIR VERDICT by showing that they misunderstood the instructions, and without such misunderstanding would not have found as they did, are inadmissible.

APPEAL from Morgan county circuit court. The case is stated in the opinion.

J. J. Hardin, for the appellant.

William Brown and H. B. McClure, for the appellee.

By Court, BREESE, J. This was an action of assumpsit, brought in the Morgan circuit court, by Eames against Smith, in which a judgment was rendered for the plaintiff, from which an appeal was taken to this court. The only points presented for consideration are, first, as to the competency of a juror who was called and sworn after being objected to; and, secondly, whether affidavits of jurors can be received to explain their verdict.

As to the first point, the bill of exceptions taken in the cause, states, that upon calling a jury, after the defendant had exhausted his peremptory challenges, Joseph J. Taggart was called as a juror, and upon being questioned by defendant's attorney, whether he had formed and expressed an opinion in relation to the right of the plaintiff to recover, answered that he had both formed and expressed an opinion. Upon being asked, by plaintiff's counsel, whether he had formed his opinion from conversing with the witnesses, or from his own knowledge of the facts, or from information derived from the parties, or from rumor, he answered, from rumor. Upon being asked, by defendant's attorney, whether he knew who the witnesses were, he

said he did not. Upon being asked by the defendant's counsel, whether he still entertained the opinion he had heretofore formed, as to which party ought to succeed in the matter, he answered, he did, if what he had heard was true. The jurymen was not interrogated as to his belief of the truth of the rumors to which he referred, as the bill of exceptions states. The defendant's attorney challenged him for cause, which the court disallowed, and he was sworn as a juror. In support of the challenge, the appellant's counsel has referred to Co. Lit. 157 a, b; 2 Pet. 499, 500;¹ 2 Johns. 194;² 7 Cow. 122;³ Bull. N. P. 307; 1 Johns. 316;⁴ 1 Cow. 432;⁵ 1 Swift's Dig. 737; 1 Burr's Trial, 41, 43, 370, 419; 4 Wend. 238, 241;⁶ 9 Pick. 496;⁷ Breece, 29;⁸ Hill. Dig. 182. Upon the second point presented, he has referred to 3 Cai. 58-61.⁹

The counsel for the appellee, to sustain the decision of the circuit court, relies upon the case of *Durell v. Mosher*, 8 Johns. 445, 3d ed.; 6 Cow. 564;¹⁰ 7 Id. 122, 123;¹¹ 1 Burr's Trial, 369, 370, 380, 381, 408, note 418; 1 Cow. 438.¹² We have carefully examined all the cases referred to, with a desire to arrive at some rule which shall be suited to our condition, which can be practically enforced, and which shall do no violence to the right of every person to a fair and impartial trial by jury. There is not a perfect coincidence of views in the several cases referred to, nor entire harmony of opinion. The old rule was, that the more a person knew of the facts, of his own knowledge, the better qualified was he to perform the functions of a juror. The doctrine now is, in England, that if a juror has declared that the prisoner is guilty, or will be hanged, or the like, if made out of ill will to him, it is good cause of challenge; but if it was made from personal knowledge of the facts in the cause, it is no ground of challenge.

The leading case in this country upon this subject, is that of *Burr*, indicted for treason. The opinions and resolutions of Chief Justice Marshall, who tried that case, upon the various objections made to jurors, as they were called, have been received favorably by all the courts of the several states, and it will not be difficult, aided by the light which his brilliant mind has shed upon the subject, to come to a conclusion, correct in principle, and calculated to promote justice. For this purpose,

1. *Queen v. Hepburn*, 7 Cr. 290.2. *Wood v. Stoddard*.3. *People v. Vermilyea*.4. *Blake v. Millspaugh*.5. *Pringle v. Huss*.6. *People v. Walker*; S. C., 21 Am. Dec. 123.7. *Commonwealth v. Knapp*; S. C., 20 Am. Dec. 491.8. *Noble v. People*.9. *Smith v. Cheatham*.10. *Ex parte Vermilyea*.11. *People v. Vermilyea*.12. *Pringle v. Huss*.

it will be unnecessary to enter into an elaborate review of all the cases cited, but to state simply the general conclusions to which they all tend, and that is, that a juror is disqualified if he has expressed a decided opinion upon the merits of the case. If, without any qualification whatever, a juror says the defendant is guilty, or the like, or that the plaintiff ought to recover in the action, or that the verdict ought to be against the plaintiff, he would be disqualified, as not standing impartial between the parties.

If, on the contrary, a juror says that he has no prejudice or bias of any kind for or against either party; that he has heard rumors in relation to the case, but has no personal knowledge of the facts; and from the rumors has formed and expressed an opinion in a particular way, if they are true, without expressing any belief in their truth, we should think he would not be disqualified. By hearing reports of a case, not from the witnesses, nor from the parties, but from common fame, and making up an opinion on them, the juror has not prejudged the case, unless the case should turn out to be precisely as the rumors were, a thing very improbable; he has adjudged only the rumors, varying in their hue and color as they circulate through the country. The human mind is so constituted, that it is almost impossible, on hearing a report freely circulated in a county or neighborhood, to prevent it from coming to some conclusion on the subject; and this will always be the case while the mind continues to be susceptible of impressions. If such impressions become fixed, and ripen into decided opinions, they will influence a man's conduct, and will create, necessarily, a prejudice for or against the party towards whom they are directed, and should disqualify him as a juror. Opinions are formed in different ways: with some, their preconceived prejudices are their opinions; with others, a current rumor fixes the belief; with another class, the most idle gossiping is received as truth itself; while others hesitate long, and demand testimony, before they will assent or dissent. Taking mankind as we find them, it may not be unreasonable to believe, that by far the greater part come to no certain conclusion on a statement of facts, until they have evidence of their existence, though they may have impressions in regard to them, which, if not carefully examined, might seem to be fixed opinions, and when called on, it would be so stated. A distinction must be made between such impressions and opinions, and in this consists the rule.

In the case of *People v. Mather*, 4 Wend. 241 [21 Am. Dec.

122], the court says: "There is no difference between an opinion formed by being an eye-witness of a transaction, or by hearing the testimony of those who were such witnesses, and an opinion founded upon rumors and newspaper publications." This is true if a decided opinion is formed, for it matters not how, or upon what it is formed, whether upon rumors or personal knowledge, so that it is an opinion. But there are grades of opinion. That which the public instinctively forms, upon the happening of any striking occurrence, or of those matters which are current topics of remark, should be distinguished from those deliberate convictions of the mind which are produced by maturely considering the facts and circumstances of a case, and which regulate a man's conduct, or prompt him to action. If a person, without any knowledge of the facts, upon the faith of rumor alone, forms a deliberate opinion, and is convinced, without any evidence, he is not fit to judge his fellows.

But if, in obedience to the laws of his organization, his mind receives impressions from the reports he hears, which have not become opinions fixed and decided, though they may seem to be at first, he would not be disqualified, and this is in accordance with the views expressed by Chief Justice Marshall in *Burr's case*. He says: "Light impressions, which may be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him:" 1 *Burr's Trial*, 416.

We take it, then, as settled, that the opinion which is to disqualify, must be a decided one, not an impression merely, which rumor may have produced, and which another report may dissipate. The opinion must, also, be a positive one, not depending upon any contingency, not hypothetical. All the cases referred to, recognize this distinction. In *Durell v. Mosher*, 8 Johns. 445, it was held, that where a juror, on being called up, said he had no personal knowledge of the matters in dispute, but that if the report of the neighbors was correct, the defendant was wrong, and the plaintiff was right, was qualified; for the reason that the opinion was not a fixed and positive one, that it depended on the hypothesis of the truth of the reports. This case has never been overruled, and is approved by all the subse-

quent cases. It establishes the principle, and for good reasons, that there must be a decided conviction of the mind, on the facts, before the juror can be considered as having formed an opinion which will disqualify. Here the juror showed which way his opinion was, if the reports were true, that he was against the defendant, who had challenged him. In the case before the court, this does not appear. It is not shown by the record, how the opinion of the juror was, whether for or against the party challenging him; and it can not be known whether the party challenging was prejudiced by his being sworn. In most of the cases cited, the opinion of the juror was made known, as in the case in 7 Cow. 381.¹ There the juror had heard the witnesses in a former trial of the same cause, and had made up his mind conclusively, that the defendants were guilty; and he had freely expressed this opinion. It is, however, the opinion of the majority of the court, that this circumstance should make no difference in the principle. A party ought not to be compelled to abide the risk of the opinion which may be formed, being adverse to him, it being considered sufficient that he has formed and expressed an opinion.

It is not perceived that the case at the bar differs in any essential particulars from the case of *Durell v. Mosher*. Taking the whole statement of the juror in connection, he said he had formed and expressed an opinion from rumor as to who ought to recover, and that he was still of the same opinion if the rumors were true, placing his opinion entirely upon the hypothesis of the truth of the rumors. He had an opinion from rumor, if the rumors were true, leaving it clearly inferable, that if they were not true he had no opinion. At most, then, he showed that he entertained not a fixed, decided, positive opinion upon the merits of the case, but had formed just such an one as all persons instinctively form when they hear a narrative of any occurrence or the history of any transaction. He showed that he had come to no certain conclusion upon the facts; that his mind was in such a condition as to be open to the testimony that might be offered, and prepared to yield to its force. On Burr's trial, Hamilton Morrison was called as a juror, and he stated that he had frequently declared, that if the allegations against the prisoner were true, he was guilty; and he was decided to be an impartial juror. In the same case Mr. Parker was called as a juror, 1 Burr's Trial, 380, 381, and being examined by the court, said "he had formed no opinion of the truth

1. *People v. Vermilyea*; 8. C., 21 Am. 122.

of the depositions, but if they were true, Burr's designs were treasonable;" and he was retained as a juror. Opinions of this character, which are hypothetical, do not disqualify.

We then lay down this rule, that if a juror has made up a decided opinion on the merits of the case, either from a personal knowledge of the facts, from the statements of witnesses, from the relations of the parties, or either of them, or from rumor, and that opinion is positive, and not hypothetical, and such as will probably prevent him from giving an impartial verdict, the challenge should be allowed. If the opinion be merely of a light and transient character, such as is usually formed by persons in every community upon hearing a current report, and which may be changed by the relation of the next person met with, and which does not show a conviction of the mind and a fixed conclusion thereon, or if it be hypothetical, the challenge ought not to be allowed; and to ascertain the state of mind of a juror, a full examination, if deemed necessary, may be allowed. Testing this case by this rule, we think the juror was properly received.

As to the second point, that the court, on the motion for a new trial, improperly rejected the affidavits of the jurors to explain the grounds of their verdict, we think there is no error. The affidavits are set out in the second bill of exceptions, and show that most of the jurors swore after they had rendered their verdict, that they understood the charge of the judge, as instructing them to find as they did, and if they had not so understood, they would have found a different verdict. In *Dana v. Tucker*, 4 Johns. 487, it was held, that the affidavits of jurors could not be received to impeach their verdict; but that they might be to support it. The same doctrine is recognized by this court in the case of *Forester et al. v. Guard et al.*, Breese, 44 [12 Am. Dec. 141]. There is one class of cases, where the affidavits of jurors may be received to impeach their verdict, and that is, where a part of them swear that they never consented to any verdict: 2 Wash. 79; 3 Burr. 383.¹ We apprehend no case can be found, where the jurors, after having consented to the verdict, have been permitted, afterwards, for the purpose of setting it aside, to explain by affidavits, the ground, or the train of reasoning by which they arrived at the result. This would be a very dangerous practice, as it would create a strong temptation in the losing party to tamper with the jurors, and thus procure their after-thoughts, produced by intercourse with the party, to

1. *Cogan v. Edden*, 1 Burr. 383.

be imposed upon the court, for their opinions in the jury-room. If they differ about the instructions of the court, they should come into court, and have them repeated; and if they fail to do this, they ought not to be permitted to show afterwards, what their impressions or views of the instructions were. Were the practice to receive the affidavits of jurors, to explain the grounds of their finding, in disputed cases, but few verdicts would be retained, as jurors might be found, who would allege as mistakes of law or fact, in making up their verdict, what were in reality after-thoughts, produced by conversations with the parties. We see no reason for enlarging the operation of the rule as adopted; it is a salutary one as limited. The power in the court to grant new trials for mistakes of law or fact, by which injustice is done, is an ample security in such cases.

There being no error in the proceedings of the circuit court, the judgment is affirmed with costs.

SCATES, J., dissented.

PRECONCEIVED OPINIONS AS GROUND FOR CHALLENGE TO JURORS.—One of the chief aims of the jury system is, to secure in every case an impartial jury. It is at the same time most difficult to accomplish. Indeed it has been well said to be one of the most perplexing problems of the law to determine how to get twelve honest and unprejudiced men into the jury-box. A prime object of challenges to the poll is to ascertain whether every person proposed for jury duty in each particular case has that equal poise of mind, with reference to the matter to be tried, which is necessary to constitute a good and lawful jurymen. The test is, as was said by Lord Coke, that every man going into the jury-box shall "stand indifferent as he stands unsworn:" Co. Lit. 155 b. Thus far there is no question as to what the law requires; but as to what shall be deemed to constitute in each particular case that degree of indifference which will satisfy this requirement, the authorities are not at all agreed.

THE RULE ESTABLISHED AT AN EARLY DAY IN ENGLAND was that no opinion previously formed or expressed by a juror as to the merits of a case was sufficient to disqualify him unless it proceeded from actual favor or ill-will towards one of the parties, or was of such a nature as to furnish of itself a presumption of such favor or ill-will. An opinion founded upon a knowledge of the facts or of what the juror honestly believed to be the facts, without malice or favor, did not affect such juror's competency, however firm and unqualified such opinion might be, or however frequently expressed. A juror is said by Sergeant Hawkins to be incompetent, where it appears "that he hath declared his opinion beforehand that the party is guilty or will be hanged or the like; yet it hath been adjudged that if it shall appear that the juror made such declaration from his knowledge of the cause, and not out of any ill-will to the party, it is no cause of challenge:" 2 Hawk. P. C., c. 43, sec. 28; Bac. Abr., Juries, E. 5. This statement of the law is founded upon a case in the year books: 7 Hen. VI., fol. 25, where Babington, Justice, is reported to have said in a charge to the triers of a challenge to the favor interposed against one proposed as a juror: "If he will pass for one party,

whether the matter be true or false, he is favorable; so if he has said that he will pass for one party, if it be for affection that he has to the person and not for the truth of the matter, he is favorable; but if it be for the truth of the matter that he has knowledge of it, he is not favorable." Fitz., Challenge, 22; *Rex v. Edmonds*, 6 Eng. Com. L. 573; S. C., 4 Barn. & Ald. 492. In Brooke, Babington, J., is reported in the same case to have stated: "If he (the juror) has said twenty times that he will pass for the one party for the knowledge that he has of the matter and of the truth, he is indifferent." Brooke, A. Challenge, 55; *Rex v. Edmonds*, *supra*. In accordance with the doctrine thus early established in England it has long been the settled law of New Jersey that an opinion based on knowledge of the facts, or on information supposed to be true, does not disqualify one from sitting on the jury in a criminal case, where there is no malice or prejudice: *State v. Spencer*, 21 N. J. L. (1 Zab.) 196; *State v. Fox*, 25 Id. (1 Dutch.) 566. In that state, therefore, there would be nothing to prevent the witnesses in a case from sitting on the jury if they had no personal feeling for or against either party. Under such a rule an opinion founded upon the knowledge that the juror "has of the matter" should, it would seem, be presumed to be honest and free from actual bias until the contrary appears; and on the other hand bias and partiality ought to be presumed where the opinion is formed without any personal knowledge of the facts and without hearing the testimony: *People v. Mather*, 21 Am. Dec. 122. Therefore a juror having formed an opinion from knowledge of the facts would be presumed competent, while a juror having formed an opinion without such knowledge and without hearing the evidence, upon mere rumors or hearsay reports, would be presumed incompetent, which is the exact converse of the rule which generally prevails in the United States.

THE RULE IN MOST OF THE STATES of the union is substantially, that if one called as a juror has actually prejudged the case, either through malice or favor or from previous knowledge of the facts, he is disqualified to sit. Therefore an opinion which amounts to such prejudgment renders the juror incompetent. The only point of difference is as to what shall be deemed such an opinion. This rule certainly seems to be more consistent with the theory of the jury system than that which obtains in England. If a juror has made up his mind before he goes into the jury-box as to how the case ought to be decided, what possible difference can it make to the litigants whether such juror has come to his conclusion from malicious motives or from prior knowledge of the facts? In either event the case is practically at an end, so far as he is concerned, before the trial begins. His preconceived opinion shuts the windows of his mind against the light of the truth. "Obstinacy of character and pride of opinion" (*Black v. State*, 42 Tex. 377) are quite as effectual as actual malice in preventing an honest juror from changing his mind when he has once fully made it up.

THE CHARACTER OF AN OPINION AND NOT ITS SOURCE DETERMINES the question as to whether it will disqualify one from service on a jury or not. In other words, it is the strength of the opinion, and not the foundation upon which it rests, which must be chiefly regarded in deciding whether, notwithstanding such opinion, the juror can give the parties a fair trial: *Boon v. State*, 1 Ga. 631; *Wormeley's case*, 10 Gratt. 658; *People v. Lohman*, 2 Barb. 216. It was held, on the other hand, in *Alfred v. State*, 2 Swan, 581, that the ground of the opinion was the principal consideration. It is true (and this was probably what the court had in mind in that case), that the grounds upon which the opinion has been formed, in such a case, are to be attentively examined, because they go far to show the probable strength of the opinion. A

juror may be, and often is, very infelicitous in his use of expressions describing his state of mind. On the one hand he may speak of the opinion he has formed as an "impression," when in reality it is a solid and unalterable conclusion upon the whole case; and on the other hand he may say that he is decidedly of this or that opinion when he really means no more than that he has actually formed an opinion, while the opinion itself may be anything but decided or absolute in its character. In such cases it is plain that the court, if informed of the foundation of the opinion, that is, as to whether it rests on mere rumor, or on personal knowledge of the circumstances, or on hearing the testimony, or the like, can determine, much more readily than the juror himself, whether the opinion is likely to be of such a nature as to influence the juror's ultimate decision. In this sense it is highly important that the court should look very closely at the grounds upon which the opinion has been formed. Where, therefore, it appears that a juror has expressed a previous opinion upon the merits of the case, it is not only the right but the duty of the court to inquire into the circumstances, and determine, from all the surroundings, whether the expression of it "was merely a casual remark or not:" *State v. Howard*, 17 N. H. 171.

FIXED OPINION NECESSARY AND SUFFICIENT.—In the absence of special statutory requirements, the prevailing doctrine in the United States on this subject is that of the principal case, that a preconceived opinion, to disqualify a juror, must either proceed from malice or ill-will against or actual favor towards one of the parties, or must be "a fixed, absolute, positive, definite, settled, decided, unconditional opinion:" *People v. Stout*, 4 Park. Crim. 117; *State v. Kingsbury*, 58 Me. 238; *Brown v. Commonwealth*, 2 Leigh, 769; *State v. Howard*, 17 N. H. 171; *McGregg v. State*, 4 Blackf. 101; *People v. King*, 27 Cal. 507; *People v. Reynolds*, 16 Id. 132; *State v. Millain*, 3 Nev. 409; Proffatt on Jury Trial, sec. 187. And it must be an abiding opinion: *Wright v. State*, 18 Ga. 383. As stated in Pennsylvania, the rule is, that to constitute a disqualification, the opinion entertained by a juror must be of a "fixed and determined character, deliberately formed, and still entertained; one that in an undue measure shuts out a different belief:" *O'Mara v. Commonwealth*, 75 Pa. St. 424; *Staup v. Commonwealth*, 74 Id. 458. Mr. Justice Caton, in *Baxter v. People*, 3 Gilm. 368, lays down this test: "If the juror is already able to respond to the question, if put to him, so as to satisfy his own conscience, 'Is the prisoner guilty or is he innocent?' then he is incompetent; but if from not being convinced of the existence or non-existence of certain facts, he is unable to determine that question, then he is competent." This would seem to require the opinion to be of such a conclusive character that the juror would be willing, before the trial, to return a verdict upon it. Such a statement of the rule, however, is perhaps too sweeping, particularly when applied to capital cases. It would admit to the jury-box, in such cases, every shade of opinion as to the prisoner's guilt or innocence, short of absolute conviction of the mind beyond any reasonable doubt. Judge Caton, however, in the case last cited, qualifies the rule thus proposed by stating that it is not necessary, to render a juror incompetent, that he "should have so far prejudged the case that his mind is not still open to conviction."

If the opinion entertained by a proposed juror is positive, unqualified, and abiding, the great weight of American authority holds him disqualified, although his opinion may have been formed merely from rumor or newspaper accounts of the matter in controversy: *People v. Mather*, 21 Am. Dec. 122; *Armistead v. Commonwealth*, 11 Leigh, 657, to be reported in 37 Am. Dec.; *Wormeley's case*, 10 Gratt. 658; *Jackson v. Commonwealth*, 23 Id. 919; *Wright*

v. *Commonwealth*, 32 Id. 941; *People v. Reynolds*, 16 Cal. 129; *People v. Edwards*, 41 Id. 640; *People v. Johnston*, 46 Id. 78; *State v. Benton*, 2 Dev. & Bat. 196. Other cases to the same effect will be referred to when we come to discuss the grounds upon which disqualifying opinions may be formed. If the opinion entertained by the proposed juror is one upon which he openly avows his determination to act, unless he hears something different on the trial, it is clearly a settled opinion: *Rothschild v. State*, 7 Tex. App. 519. Such an opinion responds exactly to the test proposed by Judge Caton, in *Baater v. People*, *supra*. Nor can there be any doubt that a juror would be disqualified by the expression of an opinion, however it may have been formed, which, by the very terms of it, indicates not only conviction of the mind, but a malevolent spirit; as where, on a motion for a new trial, one of the jurors was shown to have said before the trial, respecting the accused, "Damn him, he ought to be hung:" *Brakefield v. State*, 1 Sneed, 215. An opinion expressed without qualification, disqualifies a juror under a statute requiring the opinion to be "unqualified," although the juror himself says that in his own mind the opinion was qualified: *People v. Cottle*, 6 Cal. 228; *People v. Edwards*, 41 Id. 640. And where a juror has a "fixed" opinion at the time of his examination, based upon conversation with witnesses, and also from telegraphic reports of the facts at the time of the occurrence, he is disqualified, although he may state that if the facts should turn out to be different, he would have no opinion: *People v. Johnston*, 46 Cal. 78. So an opinion described by the juror as a "pretty substantial" one, disqualifies him, notwithstanding any professed willingness to change it if the facts should be otherwise, where it is founded upon hearing part of the testimony on a former trial: *Sprouce v. Commonwealth*, 2 Va. Cas. 375.

LIGHT, TRANSIENT, OR HYPOTHETICAL OPINION DOES NOT DISQUALIFY.—Light and transient opinions floating in the mind respecting a case do not render a juror incompetent: *McGregg v. State*, 4 Blackf. 101. So mere impressions which the juror himself does not dignify with the name of opinions, and which are not likely to influence his judgment, do not disqualify him: *State v. Pike*, 49 N. H. 399; *Howerton v. State*, Meigs, 262; *State v. Mellicott*, 9 Kan. 257; *State v. Ward*, 14 La. Ann. 673; *Gold Mining Co. v. National Bank*, 96 U. S. 640. "When one speaks of an impression upon his mind," say the court in *People v. Honeyman*, 3 Denio, 121, "he usually means something which does not amount to a fixed or settled opinion." But though the juror may refer to his state of mind as an "impression," if it is of such a persistent character as to influence his judgment and to require evidence to remove it, he is disqualified: *Greenfield v. People*, 6 Abb. (N. C.) 1; S. C., 74 N. Y. 277. So where a juror in a capital case states that he has received an "impression unfavorable to the prisoner," and then in answer to further questions says that his "prejudices are against the prisoner:" *Commonwealth v. Knapp*, 9 Pick. 496; S. C., 20 Am. Dec. 491. "A mere suspicion or inclination of the mind toward a conclusion" is not enough to disqualify a juror: *People v. Reynolds*, 16 Cal. 132; *State v. Millain*, 3 Nev. 409. "The state of the mind must be more decided. He must have reached a conclusion like that upon which he would be willing to act in ordinary matters:" *People v. Reynolds*, 16 Cal. 132, *per* Baldwin, J. Where the juror says that he has formed no opinion or impression about the case, but has a "belief" as to the guilt or innocence of the accused, he evidently refers to a state of mind which amounts to no more than a mere suspicion, and is therefore not disqualified: *State v. Mellicott*, 9 Kan. 257. Although in ordinary usage "belief" imports a mental state much more decided in its character

than is indicated by the word opinion. If the juror says he "believes" he has formed, but not expressed, an opinion, but thinks it would not influence his verdict, he is not disqualified: *Reynolds v. United States*, 98 U. S. 145. So where the juror says he "rather thinks" he has formed an opinion, or uses other expressions indicating a want of certainty in his own mind as to whether he has any opinion or not: *People v. Stout*, 4 Park. Crim. 71. So where he says he has formed a "partial opinion," but not "a positive opinion:" *Holt v. People*, 13 Mich. 224. Remarks made in jest at the time of the trial for the purpose of escaping service on the jury, however grossly improper, and whatever bias they may apparently disclose, do not constitute such expressions of opinion as will render one an incompetent juror: *John v. State*, 16 Ga. 200; *Moughon v. State*, 59 Id. 308.

It is perfectly well settled that a hypothetical opinion founded upon newspaper or other reports of the facts of a case, and dependent upon the truth or falsity of those reports, constitutes no disqualification, unless there is actual, though it may be unconscious bias: *People v. Mather*, 21 Am. Dec. 122; *Osiander v. Commonwealth*, 24 Id. 693; *People v. Reynolds*, 16 Cal. 129; *State v. Potter*, 18 Conn. 166; *Leach v. People*, 53 Ill. 311; *Burk v. State*, 27 Ind. 430; *State v. Sater*, 8 Iowa, 420; *State v. Ostrander*, 18 Id. 435; *State v. Medlicott*, 9 Kan. 257; *State v. Kingsbury*, 53 Mo. 238; *State v. Flower*, Walk. (Miss.) 318; *State v. Johnson*, Id. 392; *Lee v. State*, 45 Miss. 114; *Mann v. Glover*, 14 N. J. L. 195; *Durell v. Mosher*, 8 Johns. 445; *Freeman v. People*, 4 Denio, 9; *People v. Fuller*, 2 Park. Crim. 16; *People v. Mallon*, 3 Lans. 224; *Thomas v. People*, 67 N. Y. 218; *O'Mara v. Commonwealth*, 75 Pa. St. 424; *Epes' case*, 5 Gratt. 676. That judicial equipoise which is necessary to constitute a good juror is not at all disturbed by a merely hypothetical opinion, unmixed with any degree of prejudice, which depends for its validity upon the truth of a narration of the supposed facts. Indeed, if such opinions were admitted to constitute a disqualification for jury duty, it would be impossible in many cases to get a jury outside of an asylum for the idiotic. Every thinking mind, upon the most meager statement of the facts of a case, is apt to form these contingent, floating opinions. Indeed the mere reading of an indictment or of the pleadings in a case is enough to set the active mind at work framing conjectures as to the facts and building theories thereon. Probably every juror who goes into the jury-box carries with him some vague hypothesis that if the facts turn out so and so it will be his duty to find this or that verdict, and as the trial proceeds his mind is busy forming new theories, changing like the figures in a kaleidoscope, with every turn of the case, until at last it settles upon a definite conclusion.

In some cases it is held that even a hypothetical opinion will disqualify a juror if he affirms that he believes the account upon which the opinion is based: *Gray v. People*, 26 Ill. 344. But it is said in *Osiander v. Commonwealth*, 24 Am. Dec. 693, that such an opinion is no disqualification, even though the juror says he has no reason to doubt the truth of what he has heard. See also, to the same purpose, *State v. Williams*, 3 Stew. 454; *People v. Hayes*, 1 Edm. 582. It seems to us that if the opinion is really hypothetical, depending upon the truth or falsity of a hearsay report of the assumed facts, it ought not to render the juror incompetent whether he credits what he has heard or not.

Most of the cases holding hypothetical opinions to be no disqualification refer especially to opinions based upon mere rumors or newspaper accounts of the facts. There are cases, however, in which it has been determined that a hypothetical opinion formed from hearing part of the evidence on a

former trial of the same cause or of another similar cause, is no disqualification: *Sprouce v. Commonwealth*, 2 Va. Cas. 375; *Lycoming Fire Ins. Co. v. Ward*, 90 Ill. 545. It may well be doubted whether this is not carrying the doctrine as to hypothetical opinions too far. If the juror has formed an opinion from testimony, and not from hearsay, although he may say that if the facts should turn out to be different on the present trial, his opinion would not influence him, has he not in fact prejudged the case? An opinion formed in part upon conversation with witnesses, which the juror stated would require evidence to remove, was held a disqualification in *People v. Johnston*, 46 Cal. 78, although the juror said that if a different state of facts should be proved he would have no opinion.

The fact that an opinion is described by the juror as positive, if the facts are proved to be in accord with the rumors upon which he has based it, and that he professes a determination in that event to adhere to it, does not render it any the less hypothetical, if it is clearly dependent upon the truth or falsity of the rumors, and there is no prejudice in the juror's mind, and the opinion has not in fact become so decided as unconsciously to influence him: *McCune v. Commonwealth*, 2 Rob. (Va.) 771; *Epes' case*, 5 Gratt. 676; *Clore's case*, 8 Id. 606; *O'Mara v. Commonwealth*, 75 Pa. St. 424. But where it is left doubtful by the juror's examination in a capital case, whether an opinion founded upon rumors, and dependent upon their truth or falsity, has not acquired such strength and such influence upon his mind that he can not sit indifferent, he should be rejected: *People v. Mallon*, 3 Lana. 224.

In all that has thus far been said as to hypothetical opinions not being a good ground for challenge, reference has been had to a challenge for principal cause. In those states in which a distinction is made between challenges for principal cause and challenges to the favor, a hypothetical opinion upon the merits of a cause, though not a ground of principal challenge, may unquestionably be considered by the triors in determining whether or not there is actual bias in the juror's mind: *Freeman v. People*, 4 Denio, 9. As was said by Baldwin, J., in *People v. Reynolds*, 16 Cal. 129, a mere hypothetical opinion "is not a rule of exclusion, but may be a cause."

WHETHER THE OPINION IS SUCH AS TO INFLUENCE the mind of the juror in making up his verdict is the real point of inquiry. If the opinion is fixed and positive, there can be no question as to the juror's incompetence. But if the opinion is not of this character, and if the juror is able to say that, notwithstanding what he has heard and read, and notwithstanding the impression he may have formed, he can try the case fairly and impartially upon the evidence and upon that alone, and a true verdict render, he is a competent juror, if otherwise qualified to sit: *Gold Mining Co. v. National Bank*, 96 U. S. 640; *Eckert v. St. Louis Transfer Co.*, 2 Mo. App. 36; *State v. Davis*, 29 Mo. 391; *United States v. Reynolds*, 1 Utah, 319; *Little v. Commonwealth*, 25 Gratt. 921; *Epes' case*, 5 Id. 676; *Lohman v. People*, 1 N. Y. 379. And this is the statutory test in New York under the act of 1872, which has been pronounced constitutional: *Stokes v. People*, 53 Id. 164; S. C., 13 Am. Rep. 492; *Thomas v. People*, 67 Id. 218; *Phelps v. People*, 72 Id. 334; *People ex rel. Tweed v. Liscomb*, 3 Hun, 760. In that state, therefore, if the juror is able to say that he thinks he can try the case fairly, notwithstanding any opinion he may have formed or expressed, he is qualified. In Colorado the statutory rule is, that a preconceived opinion does not disqualify a juror, if the court is satisfied from his examination on *voir dire*, or from other evidence, that he will render an impartial verdict; and under this statute every challenge on the ground of a former opinion is a challenge to the favor, triable by the court,

and its decision is not reviewable on error or appeal: *Jones v. People*, 2 Col. 351. Other cases to the effect that a juror is not rendered incompetent by a preconceived opinion, if he professes his ability to try the case fairly notwithstanding such opinion, will be presented in discussing opinions founded upon rumors or newspaper reports. If the opinion is a decided one, the fact that the juror believes he can act impartially does not help the case, and he is clearly incompetent, unless there is a statute to the contrary: *State v. Benton*, 2 Dev. & B. 196. Professions of impartiality in such a case, should increase rather than diminish the distrust which the avowal of opinion excites. As has been often remarked by the bench and bar, the most inveterate prejudice is often loudest in its protestations of fairness.

From the rule that in order that a preconceived opinion may not disqualify it must appear that it will not influence the juror's verdict, it would seem to follow as a corollary that the opinion must not be such as to require evidence to remove the impression of it. It has accordingly been determined in a number of cases that if the opinion is such that it will require more or less evidence to satisfy the juror than would be necessary if he had no such opinion, he is incompetent: *Fahnestock v. State*, 23 Ind. 231; *Cancemi v. People*, 16 N. Y. 501; *Black v. State*, 42 Tex. 377. So, even though the juror says that he believes that he can try the case impartially: *Sam v. State*, 13 Smed. & M. 189. So in Michigan, notwithstanding the existence of a statute like the New York act of 1872: *Stephens v. People*, 38 Mich. 739. It must be confessed, however, that there are strong cases to the contrary. Thus, in *State v. Lawrence*, 38 Iowa, 51; *State v. Millain*, 3 Nev. 409, and *Orthwein v. Commonwealth*, 76 Pa. St. 414, it was determined that jurors stating that they had formed opinions which it would require evidence to remove were nevertheless competent if they were able to say that they believed that, notwithstanding such opinions, they could try the case as impartially as if they had never heard of it. To the same effect are *Wormeley's case*, 10 Gratt. 658, and *Grisson v. State*, 4 Tex. App. 374. In the case of *Orthwein v. Commonwealth*, 76 Pa. St. 414, Agnew, C. J., delivering the opinion, says: "That evidence would be required to change their first impressions has but little weight. Such must always be the fact even in the case of slight impressions or loose opinions. An impression once formed necessarily exists until something else changes it. The inquiry, therefore, turns upon the character of the opinion. Is it a prejudgment of the case? Has it such fixedness and strength as will probably influence and control the juror's verdict? or has it been formed upon the same evidence substantially as will be given upon the trial? Much weight, therefore, is to be given to the judgment of the court below, in whose presence the juror appears, and by whom his manner and conduct, as well as his language, are scrutinized."

There is much plausibility in these remarks, but they do not appear to us to be conclusive upon the question. It is exceedingly difficult to comprehend how an honest juror, who really understands what he is saying, can declare that he has an opinion that it will require evidence to remove, and at the same time state that he can try the case impartially, without being influenced by that opinion. An impression which it requires evidence to remove, is itself an influence which must have some effect in determining the final verdict. How can it be said that a juror is not influenced by his preconceived opinion when the existence of that opinion makes it necessary to produce more evidence to satisfy him than to satisfy a juror of the same capacity who has no such opinion to overcome? He is handicapped, as it were, by his opinion. In a criminal case, for instance, the presumption of law is that the accused is innocent. He enters upon the trial with that presumption in his

favor. But if one or more of the jurors have formed an opinion beforehand that he is guilty, that presumption of innocence is already overcome, so far as those jurors are concerned, and less evidence than would otherwise be required, is necessary to satisfy those jurors of the prisoner's guilt. As was said in *Black v. State*, 42 Tex. 377, "a weight is put in the scale of justice before the trial commences." Surely it can not be said, in such a case, that the result is not influenced by an opinion which thus weights the balance.

The rule in Indiana is, that if the juror's preconceived opinion will "readily yield" to the evidence, and will not probably influence him after hearing the testimony, he is not disqualified: *Fahnestock v. State*, 23 Ind. 231; *Scranton v. Stewart*, 52 Id. 68; *Guetig v. State*, 66 Id. 94; S. C., 32 Am. Rep. 99. This rule is rather equivocal. If it means that the opinion must be such that it requires only a little evidence to overcome it, it would seem to be obnoxious to the objection above stated. The courts of that state, however, regard it as equivalent to the rule that the opinion, in order to constitute no disqualification, must be such that it requires neither more nor less evidence to satisfy the juror: *Morgan v. State*, 31 Ind. 193; *Clem v. State*, 33 Id. 418; S. C., 42 Id. 420; 13 Am. Rep. 369; *Cluck v. State*, 40 Id. 263. Thus stated, the rule is consistent with what we conceive to be sound doctrine.

OPINION FROM HEARING TESTIMONY, CONVERSING WITH WITNESSES OR PARTIES FAMILIAR WITH THE FACTS, ETC.—Where the opinion of a juror is formed upon a personal knowledge of the facts, or upon information derived from witnesses or from those possessing such knowledge, it is sufficient to disqualify him, if positive in its nature: *People v. Mather*, 21 Am. Dec. 122; *Ex parte Vermilyea*, 6 Cow. 555; S. C., 7 Id. 108; *Norfleet v. State*, 4 Sneed, 340; *Quesenberry v. State*, 3 Stew. & P. 308. See also *Rollins v. Ames*, 9 Am. Dec. 79. So an opinion acquired by conversing with jurors who sat upon a previous trial of the same cause: *Ned v. State*, 7 Port. 187. So especially where the juror himself sat as juror on a previous trial, though the cause was then only partly tried: *Weeks v. Medler*, 20 Kan. 57. So where the opinion is formed from hearing the evidence on another trial of the defendant for another offense, when the same evidence would tend to convict him of the second offense: *State v. Webster*, 13 N. H. 491; or from hearing the evidence on the trial of another party for the same offense, where such evidence, if uncontradicted, would be conclusive against the party now on trial: *State v. Anderson*, 5 Harr. (Del.) 493. Where a juror has formed his opinion upon actual knowledge of the facts or upon information derived from hearing the evidence on a former trial, or from conversing with the witnesses, it is a disqualification even though the juror declares his belief that notwithstanding such opinion he can try the case impartially: *Jackson v. Commonwealth*, 23 Gratt. 919; *Armistead v. Commonwealth*, 11 Leigh, 657; S. C., 37 Am. Dec.; *Black v. State*, 42 Tex. 377; *Goodwin v. Blachley*, 4 Ind. 438. So an opinion acquired by reading the report of the testimony taken on a former trial of the same cause, notwithstanding the New York statute of 1872, before referred to: *Greenfield v. People*, 74 N. Y. 277; S. C., 6 Abb. (N. C.) 1. So in Ohio, under the statute of February 10, 1872: *Frazier v. State*, 23 Ohio St. 551. An opinion thus formed, from hearing or reading the evidence, can scarcely be regarded as otherwise than substantial, notwithstanding the juror's declaration of his belief that he can try the case fairly: *Jackson v. Commonwealth*, 23 Gratt. 919. In Nebraska, it is expressly provided by statute that a juror, having formed or expressed an opinion founded upon conversations with witnesses, or from hearing them testify, or reading reports of their testimony, he may be successfully challenged for principal cause: *Curry v. State*, 5 Neb. 412.

A juror is not, however, necessarily disqualified by an opinion formed from hearing or reading the testimony of witnesses, or from hearing what purport to be the facts from persons in whom the juror has confidence, if the opinion is not in fact a decided one, and the juror believes that notwithstanding such opinion he can try the case fairly: *Pollard v. Commonwealth*, 5 Rand. 659; *Jackson v. Commonwealth*, 23 Gratt. 919; *People v. King*, 27 Cal. 507. So where the juror says that the opinion might influence him, but he thinks it will not: *Monroe v. State*, 23 Tex. 210. If the juror has conversed with witnesses but has formed no opinion, he is, of course, not disqualified: *Thomson v. People*, 24 Ill. 60. So, where he has acted as coroner and heard part of the testimony in the case, but has formed no opinion: *O'Connor v. State*, 9 Fla. 215. Indeed, a juror can never be disqualified by what he has heard of a case, if he has formed no opinion upon it: *Commonwealth v. Thurston*, 11 Gray, 57; *State v. Howard*, 17 N. H. 171; *Roy v. State*, 2 Kan. 405. So where the juror has sat on the jury, or otherwise heard the testimony on the trial of a co-defendant of the prisoner, now on trial, but has not formed any opinion as to the guilt or innocence of the prisoner: *United States v. Wilson*, Bald. 78; *Noe v. State*, 4 How. (Miss.) 330. So where he has sat on the jury or heard the testimony on the trial of another action, between the same parties, where the cases have no relation to each other: *Algier v. Steamer Maria*, 14 Cal. 167; *Commonwealth v. Hill*, 4 Allen, 591. Of course if a juror has once known the facts, and has formed a definite opinion thereon, the fact that he has forgotten the circumstances will not remove his disqualification, for as soon as the facts are again brought to his knowledge the probability is that his dormant opinion will revive: *Eckert v. St. Louis Transfer Co.*, 2 Mo. App. 36.

OPINIONS FORMED FROM RUMORS, NEWSPAPER ACCOUNTS, ETC.—An opinion formed upon rumor or hearsay accounts of a transaction, whether printed or not, must necessarily partake somewhat of the character of the information upon which it is founded, and be more or less unsubstantial. It is almost the universal rule, therefore, that an opinion so formed shall not be regarded unless it has become absolutely fixed in the mind. The presumption is, that such an opinion is hypothetical, because every person of common understanding knows that the rumors or reports upon which it is founded are as likely as not to be incorrect: *Clore's case*, 8 Gratt. 606; *Jackson v. Commonwealth*, 23 Id. 919. The law will not intend that an intelligent juryman will form a fixed opinion, affecting the lives and property of his neighbors, upon so unstable a foundation, unless it clearly appears to be so. "Rumor," says Ruffin, C. J., in *State v. Ellington*, 7 Ired. 61, "is so proverbially false, it would seem, that no man with sense enough to sit on a jury in any case, could found upon it an opinion affecting the person or property of another that would stand one moment in opposition to evidence, given on oath in a court of justice, or on which he would pass the judgment of the law without evidence duly given."

It is therefore the rule in nearly all of the United States that an opinion founded upon rumor or newspaper accounts shall not disqualify a juror if he is able to say that, notwithstanding his opinion, he can try the case fairly and impartially upon the evidence uninfluenced by that opinion: *State v. Williams*, 3 Stew. 454; *People v. McCauley*, 1 Cal. 379; *State v. Anderson*, 5 Harr. (Del.) 493; *O'Connor v. State*, 9 Fla. 215; *Montague v. State*, 17 Id. 662; *Van Vacter v. McKellip*, 7 Blackf. 578; *Clem v. State*, 33 Ind. 418; S. C., 42 Id. 420; 13 Am. Rep. 369; *Guetig v. State*, 66 Ind. 94; S. C., 32 Am. Rep. 99; *State v. Caulfield*, 23 La. Ann. 148; *State v. Bunger*, 14 Id. 461; *Waters v. State*, 51 Md. 430; *Ulrich v. People*, 39 Mich. 245; *State v. Davis*, 29 Mo. 391; *Curry v. State*,

5 Neb. 412; *Sanchez v. People*, 4 Park. Crim. 535; *People v. Hayes*, 1 Edm. 582; *Balbo v. People*, 19 Hun, 424; *State v. Ellington*, 7 Ired. L. 61; *State v. Bone*, 7 Jones' L. 121; *State v. Cockman*, 2 Winst. 95; *State v. Collins*, 70 N. C. 24; S. C., 16 Am. Rep. 771; *Cooper v. State*, 16 Ohio St. 328; *Commonwealth v. Lenox*, 3 Brewst. 249; *O'Mara v. Commonwealth*, 75 Pa. St. 424; *Griscom v. State*, 4 Tex. App. 374; *Brown v. Commonwealth*, 2 Leigh, 769; *Wormeley's case*, 10 Gratt. 658; *People v. Johnson*, 2 Wheeler's C. C. 361. Other cases to the same effect are cited under previous heads in this note. It is the settled rule in Tennessee that an opinion formed merely upon public rumor shall not disqualify a juror: *Major v. State*, 4 Sneed, 597; *Moses v. State*, 11 Humph. 232. So held even where the juror declared that he believed the rumor and could not do otherwise, and "had a bias in his mind, and had had it ever since" he had heard the rumor: *Alfred v. State*, 2 Swan, 581. By a late statute, the legislature of that state provided that no juror should be disqualified by any opinion based upon public accounts of the case, but this statute has been declared unconstitutional, because it infringes the right of a party to a trial by an impartial jury: *Eason v. State*, 6 Baxt. 466. There is a growing inclination in courts and legislatures to the doctrine that an opinion formed from reading newspaper accounts of a case ought never to be a disqualification unless it has produced such bias in the mind of the juror that he feels that he can not try the case impartially. Such a rule seems almost a necessity in a country where newspapers are so much read as here. To hold otherwise is tantamount to making illiteracy or "stupidity the test of capacity," as was very tersely stated by Mr. Justice Cooley in discussing another phase of this subject: *Stewart v. People*, 23 Mich. 63. A distinction is to be made, however, between newspaper accounts generally, and newspaper reports of the testimony taken at a former hearing of the case, particularly where those reports are stenographic. In the latter case an opinion formed upon such report must necessarily have much greater solidity. Of course where a juror has merely read the newspaper accounts of the case without forming any opinion, his competency does not admit of question: *United States v. McHenry*, 6 Blatchf. 503.

In Vermont an opinion formed from a newspaper account disqualifies a juror even though he declares that he can try the case impartially. The courts will not require the parties to run the risk of his doing so: *State v. Clark*, 42 Vt. 629. Under a statute formerly existing in Georgia, an opinion formed from rumor respecting the guilt or innocence of the defendant in a criminal case was a disqualification: *Reynolds v. State*, 1 Ga. 222; *Anderson v. State*, 14 Id. 709. It was so determined also in an early case in Iowa: *Wau-kow-chaw-neek-kaw v. United States*, Morris, 332. No doubt a decided and settled opinion formed from mere rumor or newspaper accounts of the matter, ought to be deemed a disqualification for service on a jury, as has already been stated elsewhere in this note: *Meyer v. State*, 19 Ark. 156; *Wright v. Commonwealth*, 32 Gratt. 941. Says Lumpkin, J., in *Boon v. State*, 1 Ga. 631: "The most inveterate impressions, such even as will not yield to 'confirmation strong as proof from Holy Writ,' are not unfrequently created by rumor; and if an opinion be thus firmly rooted in a mind so weak or wicked that it will not yield to the force of testimony," it ought to be a disqualification.

OPINION UPON PART OF CASE.—An opinion formed upon one or more of the material facts of a case certainly ought not to disqualify a juror unless it plainly appears to be of such a nature as to influence the juror in determining upon his verdict upon the whole case. Thus, in a murder case it is unques-

tionably a material fact that there should have been an unlawful killing, and yet it would be absurd to say that a juror who believed or even knew that the deceased had been killed, should be deemed disqualified, although he had formed no opinion as to the guilt or innocence of the accused: *Cargen v. People*, 39 Mich. 549; *Ogle v. State*, 33 Miss. 383; *Wau-kon-chaw-neek-kaw v. United States*, Morris (Iowa), 332. So of an opinion that any other crime has been committed, but not as to whether the defendant was the person who committed it: *Friery v. People*, 2 Keyes, 424; *Stewart v. People*, 23 Mich. 63. So in a murder case, an opinion that the prisoner did the killing does not necessarily disqualify, because every killing of a human being is not murder: *Lowenbery v. People*, 27 N. Y. 336; *State v. Thompson*, 9 Iowa, 188. So, generally, an opinion as to any other material fact in the case which does not of itself involve a determination of the whole case: *Loyd v. State*, 45 Ga. 57; *Smith v. Floyd*, 18 Barb. 322; *Morgan v. Stevenson*, 6 Ind. 169; *McComas v. Covenant etc. Ins. Co.*, 56 Mo. 573. But though the opinion is only as to the existence or non-existence of some of the material facts, it will disqualify the juror if those facts are so related to the case as to render an opinion substantially the same as an opinion upon the whole case. Thus where a prisoner was on trial for perjury in swearing to an *alibi* in a case of arson, an opinion that the person accused of the arson was guilty, necessarily involves the falsity of the *alibi*, and is therefore almost tantamount to an opinion that the defendant is guilty of perjury, and the juror entertaining such opinion is incompetent: *Brown v. State*, 57 Miss. 424. So where a party is on trial for bringing Texas cattle into the state and communicating disease to domestic cattle, an opinion entertained by a juror that Texas cattle will communicate disease to domestic cattle though they have no such disease themselves, disqualifies a juror, because that fact goes far to determine the whole case: *Davis v. Walker*, 60 Ill. 452. Of course where the statute makes an opinion as to any material fact in the case a disqualification, a juror in a murder case who believes that the prisoner "killed" the deceased is incompetent: *State v. Brown*, 15 Kans. 400. The better rule is, no doubt, that the question as to whether or not an opinion upon part of the case will disqualify a juror, ought to be left to the discretion of the court: *Dew v. McDevitt*, 31 Ohio St. 139.

OPINION UPON LEGAL QUESTION is in general no disqualification: *Heath v. Commonwealth*, 1 Rob. (Va.) 735. Thus a juror was held in *Pettis v. Warren*, Kirby, 426, not to be rendered incompetent to sit in an action for assault and battery, where the defense was, that the prisoners were merely arresting the complainant as a runaway slave under a state law prohibiting slaves from traveling outside their towns without a pass, where such juror declared that in his opinion "no negro, by the laws of this state, could be holden a slave." So an opinion of a juror in an action against the agent of a foreign insurance company to collect a tax prescribed by law with respect to the right of foreign insurance companies to do business in the state on the same terms as local companies, such opinion not being shown to be connected in any way with the merits of the case: *Hughes v. City of Cairo*, 92 Ill. 339. But an opinion of a juror that a law under which a prosecution was instituted was unconstitutional, was held to render him incompetent, where at the time "it had not been judicially determined that the jury had not the right to pass upon the law:" *Commonwealth v. Austin*, 7 Gray, 51. On the other hand, an opinion in such a case that the law is constitutional, or is "a good law," would be no disqualification, because such opinion merely accords with the legal presumption, and is such as every good citizen is generally supposed to entertain: *Commonwealth v. Abbott*, 13 Metc. 120; *McNall v. McClure*, 1

Lans. 32. Of course, an opinion upon an abstract question as to whether a particular act ought to be punishable by law, or as to the suitability of the prescribed punishment, is wholly immaterial in a trial under the law, and questions upon that point are properly excluded: *Commonwealth v. Bussell*, 16 Pick. 153. But in a prosecution for burning a convent, an opinion of a juror that it is not a crime to burn convents is bias, and disqualifies such juror: *Id.* So in a trial for polygamy, the fact that some of the jurors are themselves polygamists, believing in the sanctity of the institution, is sufficient to render them incompetent: *Reynolds v. United States*, 98 U. S. 145; S. C. in court below, 1 Utah, 226.

CONSCIENTIOUS SCRUPLES against returning a verdict of guilty on circumstantial evidence, or on any evidence where the offense is punishable with death, clearly constitute bias against the prosecution, and the general rule in most of the states, established either by judicial decision or by statute, is, that a juror is thereby rendered incompetent to sit in a capital case: *Stalls v. State*, 28 Ala. 25; *Williams v. State*, 3 Ga. 453; *Gates v. People*, 14 Ill. 433; *Fahnestock v. State*, 23 Ind. 231; *Greenley v. State*, 60 Id. 141; *State v. Nolan*, 13 La. Ann. 276; *State v. Jewell*, 33 Me. 583; *Jones v. State*, 57 Miss. 684; *State v. West*, 69 Mo. 401; *O'Brien v. People*, 36 N. Y. 276; *Martin v. State*, 16 Ohio, 364; *Shafer v. State*, 7 Tex. App. 239; *State v. Ward*, 39 Vt. 225; *Clore's case*, 8 Gratt. 606. It is otherwise, however, where the juror declares that notwithstanding his scruples he thinks he can do justice between the state and the prisoner: *Williams v. State*, 32 Miss. 399. So where the juror is merely opposed to capital punishment upon principle, but has no conscientious scruples upon the subject: *People v. Stewart*, 7 Cal. 140.

PREJUDICE AGAINST PARTICULAR OFFENSES does not disqualify a juror from sitting on a trial for such an offense where he has no bias against the party on trial, and where his preconceived opinion does not in the nature of things include the particular case: *Davis v. Hunter*, 7 Ala. 135; *Williams v. State*, 3 Ga. 453. As where the juror belongs to an association for suppressing the particular class of crimes for which the prisoner is indicted: *Musick v. People*, 40 Ill. 268; *Boyle v. People*, 4 Col. 176; S. C., 34 Am. Rep. 76. But if the juror's prejudice necessarily includes the particular case, it is otherwise; as where a juror, called to sit upon an indictment for nuisance for maintaining a particular mill-dam, entertains an opinion that all mill-dams in that part of the country are nuisances: *Crippen v. People*, 8 Mich. 117.

BIAS AGAINST PARTY'S CALLING OR RACE does not disqualify a juror if there is no prejudice against the party himself, or if such bias is not so violent as necessarily to sway the judgment in the particular case; as where, on a trial under what is known as the "civil damage law," holding liquor-sellers responsible for the damages occasioned by the drinking of liquors sold by them, a juror states that he has a prejudice against the traffic, but not against the persons engaged in it, and professes his willingness and ability to act impartially in the particular case: *Albrecht v. Walker*, 73 Ill. 69; *Robinson v. Randall*, 82 Id. 521. So where a similar prejudice is entertained by a juror called to try an indictment for keeping open a tippling-shop on Sunday: *Kroer v. People*, 78 Id. 294. But if the juror's prejudice against the business is so violent that he is willing to do anything in his power to suppress it "short of raising a mob," and declares that "he has no sympathy at all for a man who will go into that kind of business," he is incompetent to sit: *Albrecht v. Walker*, 73 Id. 69. A prejudice against theaters is not ground for a challenge for principal cause in an action for libel for charging a party with maintaining a theater of a low and vicious character, but it may be a ground of

challenge to the favor: *Maretzek v. Cauldwell*, 2 Abb. Pr. (N. S.) 407; S. C., 5 Rob. 660. The fact that a juror says he does not "think much of the Italians," but believes that he can act impartially, does not disqualify him from sitting upon the trial of an Italian: *Balbo v. People*, 19 Hun, 424.

OPINION THAT THE CHARACTER OF THE ACCUSED IS BAD, or that he is a "bad man," does not disqualify a juror from sitting in a criminal case if he declares himself free from bias, and states that he thinks he can try the case impartially: *People v. Maloney*, 18 Cal. 180; *People v. Allen*, 43 N. Y. 28; *Monroe v. State*, 23 Tex. 210; *Anderson v. State*, 14 Ga. 709. "If it should be [a disqualification], notorious offenders could not be tried at all:" *People v. Lokman*, 2 Barb. 216.

OPINION THAT DEFENDANT HAS BEEN SUFFICIENTLY PUNISHED already, where a civil action is brought against him for a wrong for which he has already been indicted and punished criminally, disqualifies a juror: *Asbury Life Ins. Co. v. Warren*, 66 Me. 523; S. C., 22 Am. Rep. 590.

WHETHER OPINION MUST BE EXPRESSED.—In the early cases it is noticeable that in order to disqualify a juror on the ground of a preconceived opinion it was held to be requisite that such opinion should be both formed and expressed: *Hudgins v. State*, 2 Ga. 173; *Baker v. State*, 15 Id. 498; *State v. Godfrey*, Brayt. 170; *Boardman v. Wood*, 3 Vt. 570; *Blake v. Millsbaugh*, 1 Johns. 316; Proffatt on Jury Trials, sec. 183, and note. And it is still the rule in Vermont that the opinion must be expressed in order to disqualify the juror: *State v. Clark*, 42 Vt. 629. But no such rule exists now in other states. If the juror has formed a settled opinion, though he has not expressed it, it is enough: *Armistead v. Commonwealth*, 11 Leigh, 657; S. C., 37 Am. Dec. And the inquiry made of a juror on his *voir dire* is as to whether or not he "has formed or expressed" an opinion upon the case: *United States v. Wilson*, Bald. 78. This is logical, too, for the real question is as to the juror's state of mind, and not as to what he may have said about the case. Indeed, the most inveterate and deadly prejudice is more likely to be concealed than expressed. Still it is always important to know whether the juror has expressed his opinion, on account of the evidence that fact furnishes to the stability of that opinion. Mr. Proffatt professed himself unable to see why it should ever have been required that the juror's opinion should have been expressed in order to disqualify him: Proffatt on Jury Trial, sec. 183, note. There are, as it seems to us, at least two reasons for the establishment of such a rule originally. In the first place, it was formerly held (and is still in some cases) that a juror in a criminal case could not be himself examined on his *voir dire* as to whether or not he had formed any opinion upon the case, for the reason that if the question were answered in the affirmative it tended to the juror's disgrace, as it would be highly dishonorable to form such an opinion without hearing the evidence: *State v. Norris*, 1 Am. Dec. 564; *State v. Crank*, 23 Id. 117, and note. Hence, the only way of arriving at the juror's state of mind was to examine other witnesses, and such witnesses of course could not know anything about the juror's opinion if he had not expressed it. Another reason for the establishment of the rule requiring the opinion to be expressed, a reason which still makes it an important fact that there should have been such expression, is found in the well-known psychological truth that until an opinion has been put into words it does not acquire such fixity as to be difficult to overcome. Indeed there are some mental philosophers who hold that language is so far necessary to clear thought that until an idea has been put into words, at least in the mind of the thinker, it has no definite existence at all, but is "without form and void."

BURDEN OF PROOF IS UPON THE CHALLENGER to determine that a juror's preconceived opinion is of such a nature as to disqualify him: *Morgan v. Stevenson*, 6 Ind. 169; *Holt v. People*, 13 Mich. 224. But in criminal cases, if there is any doubt as to the juror's competency, the accused should have the benefit of it: *Freeman v. People*, 4 Denio, 35; *Holt v. People*, 13 Mich. 224; *Black v. State*, 42 Tex. 377.

THE PRINCIPAL CASE IS THE LEADING CASE in Illinois on this subject: *Leach v. People*, 53 Ill. 311, and is very frequently cited, not only in the courts of that state, but elsewhere.

AFFIDAVITS OF JURORS TO IMPEACH VERDICT, ADMISSIBILITY OF: See *Crawford v. State*, 24 Am. Dec. 467; *Elledge v. Todd*, 34 Id. 616; *Bennett v. Baker*, Id. 655, and other cases in this series and elsewhere cited in the note thereto. Affidavits of jurors that they misapprehended the instructions, are not admissible in support of a motion for a new trial: *Tyler v. Stevens*, 17 Id. 404.

JAMISON v. BEAUBIEN.

[3 SCAMMON, 113.]

VALIDITY OF CERTIFICATE OF PRE-EMPTION MAY BE IMPEACHED in ejectment brought by the pre-emptor against a party in possession under the authority of the United States, by evidence of fraud and collusion between the pre-emptor and the officers granting the certificate, the latter knowing the land not to be subject to pre-emption.

COURTS OF LAW AND EQUITY HAVE CONCURRENT JURISDICTION in cases of fraud.

ERROR to Cook county circuit court in an action of ejectment brought by the plaintiff's lessor, to recover certain land claimed by him as a purchaser by pre-emption. The purchase was proved, and the defendant, who was in possession under the authority of the United States, offered evidence to show that the pre-emption was obtained by fraud and collusion between the pre-emptor and the officers who granted the certificate, the latter well knowing that the land was part of a military reservation. The evidence was rejected. Verdict and judgment for the plaintiff, and the defendant sued out this writ, the principal error assigned being the exclusion of the evidence above mentioned.

B. S. Morris, J. Butterfield, J. H. Collins, and D. J. Baker, for the plaintiff in error.

Giles Spring and F. Peyton, for the defendant in error.

By Court, SMITH, J. This case is brought up from the circuit court of Cook county, on a writ of error. Numerous errors are assigned, predicated on the exclusion of various matters, offered to be given in evidence by the defendant, on the trial. That

embraced in the thirteenth assignment will alone be considered; as it is clear from the character of the proof excluded, the decision by which such proof was excluded is erroneous. It appears that the evidence offered, was tendered with the expressed design of impeaching the pre-emption granted, on the ground of fraud. The testimony offered and rejected, was, that the pre-emption, under which the lessor of the plaintiff claimed to have entered and purchased the premises in question, was obtained by the said lessor, by fraud and collusion, between him and the land officers who allowed such pre-emption. The single proposition then, arising out of the evidence, offered and excluded, is, whether the certificate of purchase and sale, by pre-emption, of a tract of land of the United States, can be impeached on the ground of fraud, in its obtention, between the pre-emptor and the officers granting it. Fraud, it is said, vitiates all acts, as between the parties to it; nor can there be a doubt, that fraud is cognizable in a court of law, as well as equity. It is an admitted principle, that a court of law has concurrent jurisdiction with a court of equity, in cases of fraud: 8 Pet. 244;¹ 12 Id. 11;² 1 Pet. Cond. 539.³

The evidence offered went directly to the validity of the certificate of pre-emption purchase. If it had its inception in fraud, it was certainly competent for the defendant to show the fact; and if the officers granting it were parties to the fraudulent act, it was no doubt void; and might be impeached in an inquiry in which the pre-emptor was a party. The exclusion of the evidence offered, was evidently erroneous, and for such cause the judgment should be reversed, and the cause remanded, with instruction to the circuit court to award a *venire facias de novo*.

Judgment reversed.

CONCURRENT JURISDICTION OF COURTS OF LAW AND EQUITY IN CASES OF FRAUD: See *White v. Jones*, 2 Am. Dec. 564; *Fleming v. Slocum*, 9 Id. 224; *Lamborn v. Watson*, 14 Id. 275; *Jackson v. King*, 15 Id. 354; *Garland v. Rife*, Id. 756; *Poore v. Price*, 27 Id. 582.

WHETHER EVIDENCE OF FRAUD ADMISSIBLE TO AVOID PATENT or other public grant, in an action at law: See *White v. Jones*, 2 Am. Dec. 564, and note; *Smith v. Winton*, 3 Id. 755; *Dodson v. Cocke*, Id. 757; *Alexander v. Greenup*, 4 Id. 541; *Jackson v. Lawton*, 6 Id. 311; *Jackson v. Hart*, 7 Id. 280; *Norvell v. Camm*, 8 Id. 742; *Overton v. Campbell*, 9 Id. 780. See also the note to *Stark v. Mather*, 12 Id. 565. At law, parol evidence is admissible to show that the land officers of the state have issued a grant for lands forbidden by law to be entered and granted. But where a grant has irregularly

1. *Gragg v. Sayre*.

2. *Swayne v. Burke*.

3. *Simms v. Slocum*, 3 Cranch, 300.¹

issued, the party wishing to avoid it must have recourse to a court of equity: *Strother v. Cathey*, 3 Id. 683. As to the conclusiveness generally of acts of the land officers of the government, see the note to *Boatner v. Ventress*, 20 Id. 273. As to pre-emptors' rights in general, see *Bruner v. Manlove*, post, and note.

STATE BANK OF ILLINOIS v. AERSTEN.

[3 SCAMMON, 135.]

OWNER OF BANK NOTE DIVIDED FOR PURPOSE OF TRANSMISSION, where one half is lost through the mail, may recover from the bank on presentation of the other half, for the lost half not being separately negotiable, the bank can never be injured by it.

APPEAL from Sangamon county. The opinion states the case.

Jesse B. Thomas, for the appellants.

J. Shields and J. C. Conkling, for the appellees.

By Court, *TREAT, J.* This was an action of assumpsit, brought by the appellees against the appellants. The declaration alleges that the appellees were the *bona fide* holders of a bank note made by the appellants, of the denomination of one hundred dollars (setting out the date and number, and particularly describing the note); that the note was divided by the appellees, into two parts, for the purpose of being transmitted by mail; that the agent of the appellees put the right-hand half of the note into the post-office at Charleston, Illinois, inclosed in a letter directed to the appellees, at Philadelphia; which letter, with the inclosure of the half note, was never received by them, but was lost; and that the appellees presented the left-hand half to the appellants, demanding payment of the note, which was refused. The appellants demurred to the declaration, and the court overruled the demurrer. The appellants abiding by their demurrer, the court rendered judgment against them for the amount of the note. An appeal is prosecuted to this court, and the appellants assign for error, the decision of the court in overruling the demurrer to the declaration.

The question for determination is, can the holder of a bank note, who has divided it for the purpose of transmission by mail, and has lost one half, recover of the maker the amount of the note, upon presentation of the other half? The rightful owner of a note or bill negotiable by delivery, can not recover of the maker or acceptor, upon proof that it has been lost or stolen, for it may get into the hands of a third person for a good consideration, and without any notice of the loss or larceny, who

would be entitled to recover of the maker or acceptor, on the ground that if one of two innocent persons is to suffer, it should be the one who has occasioned the loss or injury. But where it is shown, that the note or bill is destroyed, the owner can recover, for the maker or acceptor can never be called upon to make payment to any other person: Chit. on Bills, 279, 294.

Has there been such a destruction of the note in question, as to authorize a recovery by the appellees? This point has been fully, and we think satisfactorily determined, in the case of *Hinsdale v. The Bank of Orange*, 6 Wend. 378. In that case, the plaintiffs, being the holders of bank notes issued by the defendants, cut them into two parts, and put the right-hand halves into the post-office, inclosed in a letter to their correspondent, which letter, with the inclosures, was received by him. The left-hand halves were afterwards inclosed and directed in the same manner, but were never received.

The plaintiff presented the half notes received, and payment being refused, the court gave judgment against the bank for the amount of the notes, and interest from the demand. The court there decide, that the severance of the notes amounted to a destruction of their negotiability, and the plaintiffs presenting one set of the half notes, and showing themselves the owners of the whole notes, at the time they were divided, were entitled to recover, because the negotiability of the notes being at an end, the finder or holder of the lost halves would have no right to claim payment of the makers. See also the cases of *Patton v. Bank of South Carolina*, 2 Nott & M. 464; *United States Bank v. Sill*, 5 Conn. 106 [13 Am. Dec. 44]; and *Farmer's Bank v. Reynolds*, 4 Rand. 186, where the same doctrine is held. In this case, the appellants, by abiding by their demurrer, admit the ownership of the appellees in the whole note, at the time it was severed, the presentation of one of the halves and the loss of the other. A half of a note not being negotiable, the appellants can never be injured by the production of the lost half. They are effectually protected against the finder or holder of the lost half, because he will be unable to show himself the owner of the half already presented. The appellees are, therefore, clearly entitled to judgment.

The judgment of the circuit court is affirmed, with costs.

Judgment affirmed.

BANK BILL CUT IN TWO, ACTION ON, WHERE ONE PART LOST: See *Bank of United States v. Sill*, 13 Am. Dec. 44, and the note thereto.

HUNT v. THOMPSON.

[3 SCAMMON, 179.]

FATHER IS LIABLE FOR NECESSARIES FURNISHED HIS MINOR SON only upon an express promise or upon proof of circumstances from which a promise may be implied.

INADEQUATE PROVISION BY FATHER FOR CHILD'S NECESSITIES is not sufficient of itself to warrant the implication of a promise by the father to pay others for supplying the deficiency, particularly where the child is living at home.

FATHER IS NOT LIABLE FOR CLOTHING FURNISHED TO SON ABSENT FROM HOME ON A VISIT, where the son was provided with sufficient apparel on leaving home, but has prolonged his visit until his clothes have become considerably worn, and some of them outgrown, there being no evidence that the prolonged absence was at the father's instance, or that he expressly authorized the additional clothing to be furnished.

PARTY FURNISHING NECESSARIES TO SON VOLUNTARILY ABSENT from his father's house, without the father's consent, must look to the son, and not to the father, for payment, although he is not aware that the son is absent against his father's will.

APPEAL from the Morgan county circuit court. The opinion states the case.

J. Berdan and M. McConnel, for the appellant.

W. Brown, for the appellee.

By Court, WILSON, C. J. This is an action against the father for clothes furnished his infant son, under the following circumstances, as appears from the bill of exceptions: In the fall of 1838, the son, with the approbation of his father, who resided in Kentucky, came to Jacksonville, in this state, upon a visit to his friends in that vicinity. He was suitably provided with apparel for the occasion; but before the next spring, to which time he prolonged his visit, his clothes became considerably worn, and some of them too small, and the plaintiff made him a suit of clothes, for which this action is brought. It also appears, that the youth did not live with his friends, but took boarding at a tavern in Jacksonville, and contracted this and other debts, which his friends considered extravagant, and of which they informed his father, who immediately gave notice, by letters, that he would not pay his son's debts; but it does not appear that the plaintiff in the court below had notice of this fact. Heretofore the father had always furnished his son with clothes suitable to his circumstances, which were easy. Upon this evidence the case was submitted to the decision of the court, without the intervention of a jury, and judgment was

given against the plaintiff; to reverse which this appeal is prosecuted.

That a parent is under an obligation to provide for the maintenance of his infant children, is a principle of natural law; and it is upon this natural obligation alone, that the duty of a parent to provide his infant children with the necessities of life rests; for there is no rule of municipal law enforcing this duty. The claim of the wife upon the husband, for necessities suitable to his rank and fortune, is recognized by the principles of the common law, and by statute. A like claim, to some extent, may be enforced in favor of indigent and infirm parents, and other relatives, against children, etc., in many cases; but, as a general rule, the obligation of a parent to provide for his offspring, is left to the natural and inextinguishable affection which providence has implanted in the breast of every parent. This natural obligation, however, is not only a sufficient consideration for an express promise by a father to pay for necessities furnished his child, but when taken in connection with various circumstances, has been held to be sufficient to raise an implied promise to that effect. But either an express promise, or circumstances from which a promise by the father can be inferred, are indispensably necessary to bind the parent for necessities furnished his infant child by a third person.

In this case it is not pretended that the defendant gave any express authority for, or sanction to the contract with the plaintiff. What, then, are the circumstances from which such authority can be inferred? Certainly not from the bare circumstance that the son was in want of the clothes, and that they were suitable to the fortune and condition in life of the father. To sanction such a doctrine would, in numerous instances, which can be readily imagined, subject a parent to the payment of the debts of a prodigal son, contracted without his approbation, and even against his will. Where the child lives with the parent, who takes upon himself the office of ministering to his necessities, even though his provision should be inadequate, yet he would not be liable to another who might supply the deficiency, because the undertaking of the parent excludes the idea of authority in another, and the law will not sanction the interference of a stranger with parental authority or economy. And if the son is not to be regarded as a member of his father's family while staying at Jacksonville, then, in order to render the father liable for clothes furnished him, it should be shown that his prolonged residence, which rendered the clothes necessary, was at the instance of the father; for a child, by voluntarily

abandoning the home of his father, or remaining abroad against his consent, forfeits his claim to support, and those who credit him, even for necessaries, must look to him for payment; and it is no excuse that such persons were not aware that the child was acting contrary to the will of the father; for it is the duty of those who give credit to an infant to know his precise situation, at their peril. If it had been proved that it was by the command of the defendant that this son remained abroad until additional clothes became necessary, and he neglected to provide them; an authority in one who should supply his omission of duty, might well be presumed, as the necessity was occasioned by his own act. But no such exercise of authority on the part of the father is shown; nor is it reasonable to presume that because he allowed a son between fifteen and eighteen years of age to visit his friends, that he gave him authority to take boarding at a tavern for five or six months, and until he should outgrow his clothes, or wear them out, and then purchase others at will. The fact that the defendant had previously provided his son with sufficient apparel, and that he was not informed of any deficiency at the time referred to, not only exonerates him from the imputation of a dereliction of duty, but affords a strong presumption that it was not with his approbation that his son remained abroad until he became destitute of clothes. Another circumstance against the imputation of authority to furnish the son with clothes on the credit of his father, is, that so soon as he was informed of the conduct of his son by his friends, who considered it extravagant and improper, he notified them that he would not be answerable for his debts.

It is the acts of the parent, and not those of the infant, that are to be looked to as affording a presumption of authority that will render him liable; and the acts of the defendant, not having been such as to justify an inference of authority from him to the plaintiff to supply the goods sued for, he can not be made answerable for the price of them. The judgment below is therefore affirmed.

Judgment affirmed.

FATHER'S LIABILITY FOR NECESSARIES FURNISHED TO MINOR CHILD: See *Stanton v. Wilson*, 3 Am. Dec. 255; *Van Valkinburgh v. Watson*, 7 Id. 395; *Angel v. McLellan*, 8 Id. 118; *Owen v. White*, 30 Id. 572. See also *Myers v. Myers*, 16 Id. 648, and note. The doctrine above laid down, that a father is not liable for necessaries furnished to his minor child, without an express promise to pay therefor, or proof of circumstances from which a promise may be implied, is approved in *Gotts v. Clark*, 78 Ill. 230; *McMillen v. Lee*, Id. 445; *Murphy v. Ottenheimer*, 84 Id. 40; *Johnson v. Smallwood*, 88 Id. 75; *Schunckle v. Bierman*, 89 Id. 456.

ELKIN v. PEOPLE.

[3 SCAMMON, 207.]

OFFICER RECEIVING AND LEVYING EXECUTION MUST PERFECT IT, by the rule of the common law, by performing every act required to be done under or by virtue of the writ.

OFFICER SELLING LAND ON EXECUTION MAY RECEIVE REDEMPTION MONEY, even after the expiration of his term of office.

SURETIES OF SHERIFF RECEIVING REDEMPTION MONEY after his term has expired, upon land previously sold by him, are liable therefor.

APPEAL from Sangamon county circuit court, in an action against the defendants as sureties on a sheriff's bond, in which judgment was recovered by the plaintiff. The opinion states the point to be determined.

S. Strong and A. Lincoln, for the appellants.

S. T. Logan, for the appellees.

By Court, WILSON, C. J. The only question for adjudication presented by the record in this case is, as to the liability of the sureties of a sheriff where he has received money after he has gone out of office, for the redemption of land sold under execution while in office. The sureties being bound for the faithful discharge of all the official acts and duties of the sheriff, their liability necessarily depends upon the question, whether the receipt of the money by the sheriff, after the expiration of the period for which he was appointed, was an official act, enjoined or permitted by the law. The rule of the common law is, that the officer, who has received and levied an execution, must perfect it, by doing every act required to be done under or by virtue of the execution. The whole proceeding is regarded as an entire thing. And although lands are not liable to be taken and sold under an execution, at common law, yet where by statute they are subjected to be thus taken and sold, the officer in whose hands the process may be, will be bound to conform to the rules governing the proceedings under an execution levied upon chattels, unless a different proceeding is prescribed; and where a different mode of proceeding is prescribed, that necessarily becomes his rule of action, and must be complied with.

The statute of this state has subjected lands to be sold under execution; but it allows the defendant the right to redeem the same within the time, and according to the rules prescribed. Under this statute, all the proceedings of the sheriff, in this case, have taken place; and its provisions are decisive of the legality of his acts. Generally, the return of the process ex-

ecuted terminates the duty and power of the officer, because it is the last act to be done; but the statute having allowed the defendant, whose lands have been sold under execution, the privilege of redeeming the same, by the payment of the purchase money, etc., either to the purchaser or the sheriff, extends his duty beyond the return of the process, and makes the receipt of the redemption money a component part of what the law regards as an entire thing. The rule which permits the sheriff, after the expiration of his office, to finish all business previously commenced, would seem to embrace the receipt of the money by the sheriff in this case; but if there is any doubt as to the correctness of this view of the subject, that doubt, I conceive, must be removed by the eleventh section of the "Act concerning judgments and executions:" R. L. 374; Gale's Stat. 392; which provides that any defendant whose lands may be sold by virtue of any execution, may redeem the same within twelve months, by paying to the purchaser thereof, his executors, administrators, or assigns, or to the sheriff, or other officer who sold the same, for the benefit of such purchaser, the sum of money which may have been paid on the purchase thereof, etc. This provision is a confirmation and application of the rule adverted to, to a case like the present. There is no exception or restriction of payment, by the former owner of the land, to the officer in office; but he is authorized to pay the redemption money to the officer who sold the land, whether in or out of office, at the time the payment may be made. Upon the same principle that an officer shall complete whatever business he may have begun, the fifteenth section of the same act requires the sheriff who has gone out of office, to execute a deed for lands which he may have previously sold.

It is contended, that between the sheriff and the party whose lands were sold, the business was consummated by the return of the execution; that the language of the law is merely permissive to the party to pay the money to the sheriff, and not obligatory upon him to receive it. This opinion can not be correct; the right of the party to pay the redemption money to the purchaser of the land, is given in the same language that the right to pay it to the sheriff is. If neither of them, therefore, is bound to receive the money, the consequence would be, that the right of a party to redeem his lands sold under execution, which is clearly and explicitly given by the legislature, might be defeated, by the perverseness of the officer, and the cupidity of the purchaser. The right to pay the money, either to the

officer or purchaser, imposes upon either one, to whom it may be tendered, the obligation to receive it, otherwise this important provision of the statute would be utterly idle and nugatory.

The demurrer of the plaintiff to the plea of the defendant, alleging the receipt of the money by the sheriff, after a subsequent appointment to the office of sheriff, to the term for which they had executed his official bond, was properly sustained. The judgment is therefore affirmed.

Judgment affirmed.

SHERIFF WHO HAS BEGUN EXECUTION MUST COMPLETE IT, though his term of office expires in the mean time: *Bondurant v. Buford*, 35 Am. Dec. 33; *Bellingall v. Duncan*, 3 Gilm. 479, citing the principal case. As to the right of the outgoing sheriff, or his deputy, to sell property previously levied on, see *Parl v. Duvall*, 9 Am. Dec. 490, and *Lofland v. Ewing*, 15 Id. 41. As to the authority of such outgoing sheriff, or his deputy, to execute the deed where land has been sold on execution before the term of office expired, see *Allen v. Trimble*, 7 Id. 726; *Lemon v. Craddock*, 12 Id. 301; *Tuttle v. Jackson*, 21 Id. 306. See, also, the note to *Tubey v. Smith*, *post*, for an extended discussion of the power and duty of sheriffs after the expiration of their official terms. Redemption money may be paid either to the sheriff in office or to his predecessor, who sold the land: *Robertson v. Dennis*, 20 Ill. 315, citing *Elkin v. People*. The case is cited also in *Littler v. People*, 43 Id. 191, to the point that the policy of the law favors redemptions, and looks to the substance rather than the form.

LANE v. DORMAN.

[3 SCAMMON, 238.]

NEW EVIDENCE CAN NOT BE RECEIVED IN APPELLATE COURT, it seems, even by the consent of the parties.

STATUTE SHOULD BE MANIFESTLY UNCONSTITUTIONAL to warrant the court in declaring it void.

LEGISLATURE CAN NOT EXERCISE JUDICIAL POWERS.

SPECIAL ACT PROVIDING FOR SALE OF DECEDENT'S LAND, without notice to the heirs, and for the application of the proceeds to the claims of the administrator and another person against the estate, for moneys advanced and liabilities incurred by them on its account, and requiring the administrator to make deeds to the purchasers of the land, and to give bond to the heirs for the application of the proceeds as provided by the act, is unconstitutional, because it is an exercise of judicial power, and also because the heirs are thereby dispossessed of their freehold, not by the judgment of their peers, nor by the law of the land.

APPEAL from the Gallatin county circuit court, in an action of ejectment, to recover certain lands. The plaintiffs claimed title as the heirs of Christopher Robinson, deceased. The defendants claimed as purchasers under the act mentioned in the opin-

ion, and offered the act in evidence, but it was rejected, and the plaintiffs had verdict and judgment, whereupon the defendants appealed.

John A. McClernand and Jesse B. Thomas, for the appellants.

William J. Gatewood, for the appellees.

By Court, SMITH, J. This cause comes up by appeal from the circuit court of Gallatin county. The appellants seek to reverse the judgment of the circuit court rendered against them, on the trial of the cause below. The main question, it being an action of ejectment, in the circuit court, was the validity of a sale of the lands in controversy, under an act of the general assembly of this state, entitled, "An act authorizing the sale of lands belonging to the estate of Christopher Robinson, deceased," approved January 5, 1827. By the bill of exceptions taken in the cause, it appears that the circuit court decided this act to be unconstitutional and void; and on the trial rejected the evidence of the sale of the lands, and all proceedings had under it. The legislative power exercised on this occasion, and the competency of that department to pass the act, is the point to be resolved.

The first section of the act declares, that John Lane is authorized to sell so much of the lands, late the property of Christopher Robinson, deceased, as will be sufficient to raise the sum of one thousand and eight dollars and eighty-seven cents, together with the incidental costs of sale, and interest on the aforesaid sum. The second section provides, that such sale shall be at public vendue, by the said John Lane; that he shall give twenty days' notice of the time and place of selling the same, by posting notices thereof in three of the most public places in the county of Gallatin, describing particularly the lands to be sold, which may be sold on a credit of four months, with approved security. It further provides, that the proceeds of such lands shall be applied to the extinguishment of the claims against the said Robinson's estate, in favor of the said John Lane and one John Brown, for moneys by them advanced, and liabilities by them incurred, on account of said estate, and that Lane shall make and execute deeds for the same. The third section provides, that the said Lane shall give bond to the heirs of Robinson, in double the sum specified in the first section of the act, with security, to be approved by the judge of probate of Gallatin county, conditioned for the faithful application of the proceeds of such sale, according to the terms of the act, before he shall make sale thereof. These

are all the provisions of the act. Certified papers, not in the case, showing a settlement of the accounts of the administrators of Robinson, have been presented to this court, with an assent of the parties, that such papers should be taken into consideration with the record. We feel clear, that the court has no authority whatever to consider those papers, in an examination of the case; because, in an appellate court, no new evidence can be taken or received without violating the best established rules of evidence. If, however, these papers were considered, it is not perceived that the facts therein contained would vary the result.

The determining of a question, involving the inquiry whether an exercise of power by the legislative department of the state, is constitutional, is readily conceded to be not only a matter of delicacy, but of grave import, and demands the most deliberate and mature consideration. It should not, moreover, be decided but in cases of clear necessity, and where the character of the act done is in plain and obvious conflict with the constitution. It has been aptly said to be an inquiry, "whether the will of the representatives, as expressed in the law, is or is not in conflict with the will of the people, as expressed in the constitution." If the case presented can, upon its merits, be determined without such inquiry, it is the part of wisdom to decline it. So, on the other hand, although it is the highest and most solemn function which the judicial power can be called on to exercise, it should be met with firmness, when, in the course of judicial examination, a decision becomes material to the rights of either of the parties in the controversy. Whenever it is clear that the legislature has transcended its authority, and that a legislative act is in conflict with the constitution, it is imperatively required of the court to maintain the paramount authority of that instrument, which it is solemnly pledged to support, and to declare the act inoperative and void.

With the view, then, of ascertaining whether this conflict exists in the case under consideration, we proceed with the examination. The better to solve the inquiry, we shall compare the provisions of the law, with such portions of the constitution as are supposed to have been violated by its enactment. The first and second sections of the law authorize and require so much of the real estate of Robinson, the intestate, of which he died seised, as shall be sufficient to pay the sum of one thousand and eight dollars and eighty-seven cents, and the costs of sale, to be absolutely sold at public sale, and the title conveyed, in

virtue of such sale, to the purchaser; the proceeds of the sale to be appropriated to the use of Lane and Brown, for moneys advanced, and liabilities incurred, on account of Robinson's estate, and the payment of the costs of sale. From the provisions of these sections, it will be perceived that the lands of the ancestor of the heirs have been not only appropriated to the payment of the alleged debts of the ancestor, and the costs of the proceedings, by a summary proceeding, without the consent of, and without notice to, the heirs, but they have been absolutely and directly appropriated to the use of two of the creditors of the estate, to the exclusion of all other creditors, if such there be, and on transactions admitted to have transpired after the death of the intestate. By this proceeding, it would seem that the legislature has determined, first, that the sum stated was due to the persons named in the act, from Robinson's estate; secondly, that it was due for moneys advanced, and liabilities incurred, on account of such estate, after the intestate's death. To have ascertained these facts, they must be presumed to have necessarily investigated the justice and legality of these several claims, and determined from evidence, or otherwise arbitrarily determined, that the moneys were due, and that the liabilities actually existed, as stated. They have, also, appropriated a part of the proceeds of the lands for a mere liability incurred, and not for an actual advance or payment of money; thus appropriating the lands to persons who had acquired no legal right to demand a remuneration for liabilities merely incurred, but not yet discharged, paid, or satisfied.

By the first section of the first article of the state constitution, the powers of the government of the state are divided into three distinct departments, and each of these confided to a separate body of magistracy, viz.: those which are legislative to one; those which are executive to another; and those which are judiciary to another. By the second section of the same article, no person, or collection of persons, being one of those departments, shall exercise any power properly belonging to either of the others, except as is therein expressly directed or permitted. The exercise of judicial powers by the general assembly is not one of the exceptions; nor is it one of the permissions contained or referred to in the proviso to this second section; consequently the exercise of such powers by it is positively forbidden, and expressly inhibited, and it has been delegated solely to the judicial department. The inquiry then becomes important, has the legislature, by the passage of this law, violated

this provision of the constitution? It will be seen, from the synopsis of the act made, that evidence must be presumed to have been received, and facts ascertained by the legislature, before its decision, or it has, without such evidence, arbitrarily assumed the facts to exist; and on such ascertainment, or assumption, a decision is made in the nature of a decree. For the act directs the sale of the lands, and orders the appropriation of its proceeds to the persons on whose application, and for whose benefit, the act was adopted, and adjudges the costs to be paid out of the estate. If this is not the exercise of a power of inquiry into, and a determination of facts, between debtor and creditor, and that, too, *ex parte* and summary in its character, we are at a loss to understand the meaning of terms; nay, that it is adjudging and directing the application of one person's property to another, on a claim of indebtedness, without notice to, or hearing of, the parties, whose estate is diverted by the act.

That the exercise of such powers is, in its nature, clearly judicial, we think too apparent to need argument to illustrate its truth. It is so self-evident, from the facts disclosed, that it proves itself. And it is not less certain, that the exercise thereof is in direct conflict with the articles of the constitution cited. The injustice, too, of the exclusiveness of the law, is manifest. Why should the two persons named in the act be preferred to all the other creditors of the intestate? If the act was sought to have been adopted, on the general principle of applying the real estate of the intestate to the payment of all his just debts, it should have been so framed, and not have been made exclusive in its character and objects. The necessity for such an act, however, could not have existed, because, under the general laws of the state, where the personal estate of an intestate is insufficient for the payment of debts, the circuit courts of the state are vested with power, on proper application by the executor, or administrator, to direct its sale and so apply its proceeds. If, however, the real object of the act was to reimburse (as was urged on the argument, but which does not appear in the case), the administrators, for moneys advanced by them in the course of administration, and to protect them for liabilities they had voluntarily incurred in the course of that administration, the grounds are, in our judgment, still more objectionable. The laws of the state are sufficiently ample to afford all just relief, in such a case. By a regular course of legal investigation, in its tribunals, where the matters could be deliberately exam-

ined, and all parties interested heard, it is certain, that in a proper case, and on sufficient proofs, the respective rights of the parties would be fairly ascertained and determined. On such an application, it is however true, that the liabilities incurred would not have been recognized as subsisting debts, or claims against the estate, until discharged or liquidated; and if so, the injustice of subjecting the lands to sale for such causes, is, we think, rendered the more apparent.

Another clause of the constitution is, also, we think infringed. By the eighth section of the eighth article, it is declared that no freeman shall be disseised of his freehold, but by the judgment of his peers, or the law of the land. If it be admitted, that under the conventional rules of government, flowing from the constitution, as adopted by common consent, it is competent for the legislature to subject the real estate of the ancestors of heirs, for the payment of the debts of the ancestors, to sale by a general law; and if it be further conceded, that it may rightfully direct, by a special act, in any case, such sale for the purpose of applying the proceeds to the payment of all the claims subsisting against the ancestor, under the supervision of the court of probate of the county where such lands may be, or other appropriate tribunal, still the act in question is not one of that character. It is obnoxious to the objection stated. The legislature, in the exercise of the power asserted, not only assumes the functions of another department of the government, but, it seems, disseises the freehold of the heirs of the ancestor, without a hearing, upon an *ex parte* application, and *ex parte* evidence. It will not, we suppose, be seriously contended that such an act, thus passed, under such a state of facts, is the *lex terræ* meant, or the judgment of one's peers intended by the constitution. Besides, the act is for the special benefit of two creditors, and none other. It is, therefore, not only indefensible upon the general principle of applying the real estate to the payment of all the debts of the ancestor, but is highly unjust by the preference thus given over other creditors, to their prejudice.

We have been referred to decisions in two cases in Kentucky, relative to sales made by virtue of special acts of the legislature of that state, of real estate, for the payment of the debts of the ancestor. Those cases have been examined attentively. We, however, discover nothing in them but doubtful affirmances of acts, where the sales were for the benefit of all the creditors, and the conveyance of land agreeably to previous contracts of the intestate. In the case of *Kibby v. Chittwood's Adm'rs*, 4 T. B.

Mon. 94 [16 Am. Dec. 143], Chief Justice Bibb, in delivering the opinion of the court, remarks: "The exercise of such a power has been, at least in one instance, resisted by the executive department, but has not been hitherto a subject of minute investigation in the judicial department. Indeed, these acts are so various in their natures, and different in their circumstances, and objects, that no one general constitutional provision could, perhaps, embrace the whole, and many must rest on their particular circumstances, and be opposed by different constitutional provisions. In the legislative department, they have not been adopted without opposition arising from constitutional objections, and it is perhaps a matter of regret, that so many have passed that body. One great objection seems to be, that the power of infants over their real estate is denied to them by the general laws of the land, and while their own volition is thus restrained, and their hands tied, these special laws dispose of their real estate, without their concurrence, without permitting them to be consulted; and whether the legislature can dispose of their real estate, or take it from them, by laws which operate like the revocation of a grant, consistently with every constitutional provision, is a question of much importance; but the particular circumstances of each case, and the object of the legislature in making each act, ought to be considered in deciding on each of these acts. We are aware that one objection, which presents a question of acknowledged difficulty, presents itself against legislative transfers of estates, without the consent of the owner, and that is, is such a proceeding within the scope of legislative authority, or is it a power properly belonging to other departments of the government, or to individuals themselves, and not granted by our compacts to either department? This we leave, also, till a proper case occurs for its discussion, as we have seen that the power of subjecting estates to debts, is within the compact, and conceded to legislative authority."

In the case of *Shehun's Heirs v. Barrett's Heirs*,¹ the legislature of Kentucky, in 1796, passed an act, with a preamble, appointing commissioners over the estate of Joseph Barnett, for the benefit of his creditors. The preamble recited that Barnett had died intestate, leaving but little personal estate, and considerable lands; that he had sold, and not conveyed, many of these lands, and that others would be lost, for want of attention; and as nobody would administer on his estate, his creditors were suffering. The act then vested the estate in certain commis-

1. *Shehun's Heirs v. Barnett's Heirs*, 6 Mon. 592.

sioners, who were directed to convey in fulfillment of his contracts for lands; to sell his personal estate and pay his debts; and if that proved insufficient, to sell and convey so much of his lands as might be necessary for that purpose, on a credit; and to apply the proceeds in discharge of his debts. They were also authorized to sue for debts due the estate, and made subject to suits by creditors. They were in fact created by a special act, administrators, with the vestiture of the real estate of the intestate, and power over it to sell and convey. The court decided, in this case, upon the authority of the case of *Kibby v. Chitwood's Administrators*, that it had been held that where real estate ought, by the general laws of the land, to be sold for the payment of debts, the legislature might subject it, by a special law, for that purpose, when the rights of the parties concerned were held inviolate. It however said: "We are still disposed to confine this decision exclusively to one class of cases, viz., to the subjecting lands to debts by special act, which were before subject to the same debts by the general laws of the land, without materially affecting the rights of the parties; and we would not be understood as giving our sanction to other appropriations of the real estate of minors, for other purposes. It will be time enough to decide upon other cases, when they occur."

These cases are clearly distinguishable from the case at bar. The acts were for the benefit of all the creditors of the estates, without distinction, and in one case, in addition, for the purpose of perfecting titles contracted to be made by the intestate. The claims of the creditors of the intestate were to be established by judicial or other satisfactory legal proceedings, and, in truth, in the last case cited, the commissioners were nothing more than special administrators. The legislative department, in passing these acts, investigated nothing, nor did an act which could be deemed a judicial inquiry. It neither examined proof, nor determined the nature and extent of claims; it merely authorized the application of the real estate to the payment of debts generally, discriminating in favor of no one creditor, and giving no one a preference over another. Not so in the case before us; the amount is investigated and ascertained; and the sale is directed for the benefit of two persons exclusively. The proceeds are to be applied to the payment of such claims and none other, for liabilities said to be incurred, but not liquidated or satisfied; and those too created after the death of the intestate. We can not hesitate in declaring our conviction that the act is in direct conflict with the provisions of the constitution cited,

and it is consequently inoperative and void; and no estate, therefore, passed by the sale and conveyance of the lands made under it. The judgment is affirmed, with costs.

Judgment affirmed.

APPELLATE COURT IS CONFINED TO PROOFS upon which the decrees impeached for error was founded: *Gillis v. Martin*, 25 Am. Dec. 729.

LEGISLATURE CAN NOT CONSTITUTIONALLY EXERCISE JUDICIAL POWER: See *Merrill v. Sherburne*, 8 Am. Dec. 52; *Dupuy v. Wickwire*, 6 Id. 729, and note; *Hoke v. Henderson*, 25 Id. 677; *Officer v. Young*, 26 Id. 268; *Jones v. Perry*, 30 Id. 430, and note referring to other cases in this series on the same subject; *Commonwealth v. Farmers' etc. Bank*, 32 Id. 290. The doctrine of *Lane v. Dorman*, on this point, is referred to with approval in *Mason v. Wait*, 4 Scam. 134; *Edwards v. Pope*, 3 Id. 471.

SPECIAL ACT AUTHORIZING SALE OF DECEDENT'S PROPERTY to pay his debts is constitutional: *Kibby v. Whitwood*, 16 Am. Dec. 143, and note; *contra Jones v. Perry*, 30 Id. 430. A special act authorizing a sale of the property of minors, to provide funds for their education and maintenance, is constitutional: *Cochran v. Van Surlay*, 32 Id. 570. On the point that a special act authorizing a sale of a decedent's estate to pay debts, without providing any method of judicial ascertainment of the debts due, the principal case is followed in *Davenport v. Young*, 16 Ill. 551; *Rozier v. Fagan*, 46 Id. 404; *Dubois v. McLean*, 4 McLean, 488. In *Rozier v. Fagan*, the court say: "We can perceive no difference, in principle, between this case and that of *Lane v. Dorman*, 3 Scam. 238. With that decision the profession has been universally satisfied, and this court has pronounced no judgment upon questions of constitutional law resting upon a sounder basis." That a sale under a void authority is void, is a general proposition to which the case is cited in *Dorman v. Lane*, 1 Gilm. 150, which was a subsequent decision in the same case.

STATUTE MUST CLEARLY TRANSCEND THE CONSTITUTIONAL LIMITS of legislative authority before it will be declared void: *Bourland v. Hildreth*, 28 Cal. 228; *Prettyman v. Supervisors of Taxewell*, 19 Ill. 411; *Chicago etc. R. R. Co. v. Smith*, 62 Id. 271; *Twitchell v. Blodgett*, 15 Mich. 151, all citing the principal case. To the same effect, see *City of Louisville v. Hyatt*, *post*, and cases cited in the note thereto.

BRUNER v. MANLOVE.

[3 SCAMMON, 339.]

PERSON HAVING ACQUIRED INCHOATE RIGHT OF PRE-EMPTION to a tract of land under the act of May 29, 1830, by settlement and cultivation, may, upon making proof and paying the purchase money within one year, compel a conveyance by a purchaser thereof by virtue of a Vincennes certificate, under the act of May 11, 1820, who entered and purchased the land after such inchoate right accrued, but before the pre-emption price was paid, and may enjoin such purchaser from recovering the land.

OPEN AND NOTORIOUS POSSESSION OF SETTLER ON PUBLIC LAND, under the act of May 29, 1830, is notice to all the world of his equitable right of pre-emption.

ERROR to Schuyler county circuit court. The opinion states the case.

M. McConnel, for the plaintiffs in error.

W. A. Minshall, for the defendants in error.

By Court, BREWER, J. The decision of the case of *Isaac v. Steel*, 3 Scam. 97, pronounced at this term, renders a particular examination of the various errors assigned and points made by the plaintiffs here unnecessary. No material difference is perceived between the two cases, and most of the views presented in the opinion delivered in that case, will apply to this. It is sufficient to observe briefly, that the plaintiffs in error, on the third day of August, 1830, entered and purchased the land in controversy, at the land office at Springfield, by virtue of a Vincennes certificate, granted under the act of May 11, 1820, and obtained the usual certificates thereof. On the same day, the defendants in error made proof to the satisfaction of the same land officers, of their right of pre-emption to the land, as required by the act of May 29, 1830, and tendered the money therefor, which was refused, and the case referred to the general land office for decision. The commissioner directed the land officers to receive the money of the defendants in error, and refund that which the plaintiffs in error had paid; and on the twenty-ninth day of January, 1831, their money was received, and a certificate granted them. They also exhibit the certificate of the register of the same land office, of the entry and purchase by them, of the land under this pre-emption act.

The plaintiffs in error having the oldest certificate, brought their action of ejectment in the Schuyler circuit court, against the defendants, who were in possession of the land, and had been in possession, cultivating the same, continuously, since 1825, and recovered a verdict and judgment, and threatened to turn them out of possession. To prevent this, the defendants filed their bill in chancery, setting forth these facts, charging a knowledge of all of them upon Teel, one of the plaintiffs in error, and alleging a combination between him and the others, Bruner and McConnel, to defraud them, and pray for an injunction to restrain farther proceedings in the ejectment cause, and that the defendants, the plaintiffs in error here, may be decreed to convey all their title and interest to the land to them, and for general relief. Teel answered, denying the fraud and combination, and demurred, with the other defendants, to the bill, which

demurrer was overruled, and a decree rendered for the complainants, that they be quieted in their possession, as against the defendants; that the defendants' title be set aside, and for nothing esteemed, as to the complainants, and that McConnel be ruled to convey, by quitclaim deed, to the complainants, all the right, title, and claim he may have to the land, growing out of the purchase by Bruner, and which Bruner had conveyed to him, in trust, as alleged in the bill, for the joint use of himself, Teel, and McConnel.

The assignment of errors questions the propriety of this decree, the plaintiffs insisting that the possession of the Vincennes certificate, being issued in 1820, under the act of eleventh of May, of that year, gave them a prior equity, to which they had a right to attach the legal estate, by purchase from the United States; that having done so, before the defendants paid for the land, their right must override the defendants. This is the substance of their argument, and to test its soundness, reference must be had to the provisions of the act of May 11, 1820. That act is entitled "An act for the relief of certain settlers in the state of Illinois, who reside within the Vincennes land district:" 1 U. S. L. 329. The second section of this act, which alone bears on this case, provides, in substance, that every person who would have been entitled to the right of pre-emption, in the Vincennes district, according to the provisions of an act of congress, passed on the fifth day of February, 1813, entitled, "An act giving the right of pre-emption in the purchase of lands, to certain settlers in the Illinois territory;" if that act had been construed so as to embrace them, and who did not, by reason of the construction placed upon it, become the purchaser of any tract of land to which such right of pre-emption would have attached, shall be allowed until the first day of September next, to prove to the satisfaction of the register and receiver at Vincennes, that they would have been so entitled; and it is made the duty of the register, when such satisfaction is made, to grant a certificate to every such person, or their legal representatives, stating in it, that such person would have been entitled to such right of pre-emption, and that he did not become the purchaser of the land, either at public or private sale; and every such person, or his legal representative, upon producing such certificate to the register of any land office in the state of Illinois, shall be allowed to enter one quarter section of land each, at the minimum price, of any land which may be surveyed previous to the first day of

September, whether the land shall have been offered at public sale or not.

It will be perceived that this act grants no right to any particular quarter section of land, but merely the privilege of paying in the certificate in lieu of money, for such quarter section as might be selected. If the land in controversy had been selected before the passage of the act of the twenty-ninth of May, 1830, there is no doubt it could have been paid for in this certificate; the fact being admitted that it was surveyed previous to the first day of September, 1820. But it was not; it was not selected for purchase, until after the passage of that act, when the defendants in error had obtained by settlement and cultivation, an inchoate right to it, and which they had one year thereafter to perfect, by making the required proof, and paying the price demanded. If, as we have already decided, the payment of money for a tract of land claimed under this law, by a pre-emption, by another person, gave to such person no right over the pre-emption, payment in a certificate could confer none.

The defendants' claim by possession and occupancy was open and notorious, and notice to all the world of their equitable title to all the benefits designed to be conferred by the provisions of the pre-emption law, and until the expiration of the time limited by it, they had an unquestionable right to avail themselves of those benefits, and no third person could interfere to defeat them. The defendants did avail themselves of these benefits, in the required time, and thus perfected their right against all others. The demurrer admits all these facts as charged by the defendants in error, in their bill of complaint, and we have no doubt it was properly overruled. The form of the decree differs somewhat from the special prayer in the bill, but is not repugnant to, or inconsistent with the prayer for general relief. The decree is therefore affirmed with costs

Decree affirmed.

4 **PRE-EMPTOR'S RIGHTS, NATURE AND EXTENT OF:** See *Henry v. Welch*, 23 Am. Dec. 490, and the note thereto discussing this subject. See also *Bird v. Ward*, 13 Id. 506, and note, as to the power of a court of equity to decree one who has by fraud entered land to which another has a valid pre-emption right, a trustee for the latter. As to avoiding a certificate of pre-emption fraudulently obtained in a court of law, see *Jamison v. Beaubien*, ante, 534. The principal case is cited in *Lester v. White's Heirs*, 44 Ill. 466, to the point that the pre-emption law grants an estate upon condition which becomes absolute upon performance; and in *Brill v. Stiles*, 35 Id. 306, to the point that a junior patent or certificate prevails over an elder one where the former is based on a prior right. The case is also referred to and distinguished in *Hutton v. Frie-*

bid, 37 Cal. 498, as not conflicting with the doctrine there held, that a pre-emptioner before payment has no such title as will prevent the government from withdrawing the land from pre-emption. It is distinguished also in *Gray v. McCance*, 14 Ill. 345; and is cited in *Robbins v. Swan*, 54 Id. 51, as to the conclusiveness of the decisions of the land officers of the government as to the rights of a pre-emptioner.

POSSESSION IS NOTICE OF TITLE: See *Johnston v. Glancy*, 28 Am. Dec. 45, and the note thereto, collecting the previous cases in this series on that point, and *Hardy v. Summers*, 32 Id. 167, and note.

CASES
IN THE
SUPREME COURT OF JUDICATURE
OF
INDIANA.

SEYMOUR v. WATSON.

[5 BLACKFORD, 556.]

FENCE BUILT ON GOVERNMENT LAND BY MISTAKE by an adjoining proprietor becomes part of the freehold, and passes to a subsequent purchaser of the land, and it is trespass for the party erecting it to remove it.

TRESPASS *quare clausum fregit*. The opinion states the case.

A. S. White and R. A. Lockwood, for the plaintiff.

J. Pettit, for the defendant.

DEWEY, J. *Trespass quare clausum fregit*. Plea, not guilty. Verdict and judgment below for the plaintiff. It appeared in evidence, that the plaintiff and defendant were the proprietors of adjoining fields; that the defendant purchased his land of the United States, and before his lines had been run, and while the plaintiff's land was vacant, inclosed his field with a rail fence made with his own rails, and that in doing so he placed a part of the fence on the land of the United States, which the plaintiff afterwards purchased; and that the defendant moved the fence from the land of the plaintiff to his own land. This is the trespass complained of. The court instructed the jury that, under the circumstances above stated, the rails removed by the defendant were the property of the plaintiff, although the former had placed the fence on the land of the latter by mistake. Whether this instruction be correct or not, is the only question presented by the record.

We think the law was correctly given to the jury. It is a general principle, that all permanent buildings follow the tenure

of the soil on which they are erected. The fence which incloses a field is within this doctrine. It is necessary for the use and occupation of the ground, and can not be removed without injury to the freehold; on alienation, it passes with the soil: 2 Kent's Com. 342; 3 Bac. Abr. 63; *Hutchinson v. Mains*, 1 Al. & Nap. 155, cited in 2 Harr. Dig. 1163. That the defendant placed the fence in question on the land of another by mistake, does not alter the matter; it was no less a part of the freehold for that reason. Being the property of the United States in consequence of its annexation to the soil, it passed to the plaintiff by virtue of his purchase of the land on which it stood.

By Court. The judgment is affirmed with costs.

WHATEVER IS ANNEXED TO FREEHOLD generally becomes part of it, and can not be removed: *Caldwell v. Eneas*, 12 Am. Dec. 681; *Miller v. Plumb*, 16 Id. 456; *Coombs v. Jordan*, 22 Id. 236. See also generally as to what are fixtures, the note to *Gray v. Holdship*, 17 Id. 686, in which the question as to fences becoming part of the realty, is considered at pages 690 and 693.

FINDLEY v. STATE.

[5 BLACKFORD, 576.]

CHANGE OF VENUE IN CRIMINAL CASE IS DISCRETIONARY, and a refusal thereof can not be assigned as error.

OVERRULING OBJECTION TO PROOF OF DEFENDANT'S STATEMENTS in answer to promise of favor by a witness, by assisting to clear him of a charge of crime, if he would state certain facts to the witness, is not error where the statements, when introduced, show on their face that they were not made in any expectation of procuring the promised benefit, and that they could not have any tendency to procure such benefit.

CIRCUMSTANTIAL EVIDENCE NEED NOT BE SO CONCLUSIVE in a criminal case as to exclude every possibility of the defendant's innocence, in order to justify his conviction. If the jury, from the evidence, are satisfied of the defendant's guilt beyond any reasonable doubt, they may convict him, although there is no evidence proving or tending to prove it impossible for another person to have committed the crime.

DEFENDANT'S FAILURE TO DISPROVE SOME OF THE CIRCUMSTANCES proved against him in a criminal case should have no weight with the jury, if, from all the circumstances proved, they are not satisfied of his guilt beyond a reasonable doubt.

ERROR to the Jackson circuit court. The case appears from the opinion.

J. G. Marshall, for the plaintiff in error.

H. O'Neal, for the state.

BLACKFORD, J. Indictment for murder by shooting the deceased with a rifle. Plea, not guilty. Motion for a change of venue overruled; verdict against the defendant; motion for a new trial overruled; and judgment on the verdict. The errors assigned are as follows: 1. The refusal of the court to change the venue. 2. The admission of illegal evidence. 3. The refusal of the court to give certain instructions to the jury.

The first error assigned is insufficient. The statute relative to a change of venue in criminal cases, after setting out the causes for which the prisoner may petition for a change of venue, says, "which change of venue the said court may, at its discretion, award:" R. S. 1838, p. 603. Under this statute, the granting or refusing of a petition for a change of venue, is entirely a matter of discretion with the circuit court, over which a court of error has no control. It is not enacted that, upon the prisoner's making an affidavit of the existence of either of the causes named in the statute for a change of venue, the venue shall be changed; but the enactment only is, that the party in such case has the right to petition, and that the court may, at its discretion, change the venue. Although a legal cause for filing the petition exist, the right is still reserved to the court to overrule the petition if they think proper.

The second error assigned, viz., the admission of illegal evidence, is also insufficient. The statement in the record as to this point is as follows: "On the trial of the cause, Thomas Crabb was introduced as a witness on the part of the state, and testified before the jury that he stayed at the house of the defendant the night after the body of the deceased, Leroy Gilbert, was found; that early the next morning, the defendant asked him to go out of the house with him, and he accordingly went with the defendant out of the sight and hearing of the company; that thereupon, when alone with the defendant, the defendant asked him what he thought of his, the defendant's, case; that the witness then stated to the defendant that he had studied out a plan, provided the gun could be found, by which the defendant could come clear, or which would be to the defendant's advantage (the witness did not remember which form of expression he used); that the witness told the defendant he knew the common talk was that the man had died last night or a short time before, and the wife of the deceased said his gun would go off half cocked; that if defendant knew where the gun was and would tell him, the witness would take it and

throw it within some reasonable distance of the place, and when the coroner came, they would not know whether he shot himself or not. The witness was then proceeding to state what the defendant said to him, when defendant objected to the witness' stating any confessions made to him by the defendant after the above proposition was made to the defendant by the witness, because such confessions were induced by the prospect held out to him by the witness, that the condition of the defendant would be bettered thereby, but the court overruled the objection and directed the witness to state them. The witness accordingly stated that the defendant, in reply to him, said: 'Oh God! Tom, that would never do; they would find out better; they would find out he was shot plumb dead;' that the witness then said to the defendant, 'Did you kill him, William?' The defendant answered no."

Whether any promise of favor made by the witness, he not having any authority, can exclude any confessions made by the defendant under the influence of such promise, or whether the witness' language to the defendant, if otherwise unobjectionable, was calculated to produce the undue influence, recognized by the law as rendering confessions made under it exceptionable, are questions which we shall not now stop to examine. Assuming, for the present, the affirmative of these questions, we must inquire whether any confessions of the defendant tending to show his guilt, and made under the influence to which we have alluded, were given in evidence? It is true, that the prosecutor proposed to introduce such evidence; that the defendant objected to it; and that the court overruled the objection. But still we are of opinion that no such confessions, made under such influence, did, in reality, go to the jury as evidence; and if they did not, then the decision of the court in favor of their admission did not injure the defendant, and he can not complain of it. It is obvious that the statements of the defendant, admitted in evidence after the objection was overruled, though they had been made in reply to the proposition of the witness, were not made under an expectation that such statements would produce that advantage to the defendant, which it was the apparent object of the witness to obtain for him, nor, indeed, that they could procure for him any other advantage; and if the statements in question were not made under any such expectation of benefit to be received by the defendant in making them, the objection to them as evidence, on the ground that they were so made, has no foundation. Looking at the nature and object of the statements,

and the circumstances under which they were made, we consider them to have been made freely and voluntarily, and, of course, not subject to the objection urged against their admission.

The last error assigned relates to the instructions to the jury asked for by the defendant and refused; and it must be observed, as to this part of the cause, that the evidence was all circumstantial. The following is the first of these instructions: "To convict the defendant on circumstantial evidence alone, the circumstances must be of a conclusive nature; they must exclude, or tend to exclude, the possibility of the truth of any other person than the defendant being the murderer." This instruction, we think, was correctly refused. It can not be indispensable to a conviction on circumstantial evidence, that the evidence should exclude, or tend to exclude, the possibility that any other person than the defendant committed the crime. If the jury be satisfied from the evidence, beyond a reasonable doubt, of the defendant's guilt, they may convict him; and they may be so satisfied without evidence proving or tending to prove that it was impossible that another should be the guilty person.

The second of these instructions is as follows: "If the testimony before the jury does not prove the guilt of the defendant beyond a rational doubt, the fact that the defendant does not disprove circumstances proved before them ought not to give additional weight to such circumstances as are proved, unless the jury believe the defendant has the means of disproving them if they be false." This instruction ought to have been given. If the circumstances proved did not satisfy the jury beyond a rational doubt, of the defendant's guilt, he was entitled to an acquittal, whether he did or did not disprove any of those circumstances; and the court, when asked, was bound so to instruct the jury. The record shows that the court gave a general charge to the jury, but as it is not set out, it can have no influence on the case.

By COURT. The judgment is reversed and the verdict set aside. Cause remanded, etc.

CONFESSIONS MADE UNDER ENCOURAGEMENT to expect favor, admissibility of as evidence: See *State v. Phelps*, 34 Am. Dec. 672, and cases cited in the note thereto. See also *State v. Soper*, 33 Id. 665.

JURY SHOULD BE SATISFIED BEYOND REASONABLE DOUBT in criminal case in order to convict: *Hipp v. State*, 33 Am. Dec. 463.

SUMNER v. STATE.

[5 BLACKFORD, 579.]

REFUSAL OF CHANGE OF VENUE IN CRIMINAL CASE is not assignable as error.

EVERY MATERIAL CIRCUMSTANCE MUST BE PROVED BEYOND A RATIONAL DOUBT to justify a conviction in a criminal case, and every circumstance not so proved should be discarded in making up the verdict.

EVIDENCE NEED NOT BE SO CONCLUSIVE AS TO EXCLUDE EVERY POSSIBILITY that the crime might have been committed by another, to justify a conviction in a criminal case.

REFUSAL OF INSTRUCTION SO AMBIGUOUSLY WORDED that it might be understood by an unprofessional man of ordinary capacity in a sense that would make it erroneous, is not assignable as error.

CIRCUMSTANTIAL EVIDENCE SHOULD BE SO STRONG as to tend to convince the jury of the defendant's guilt, and to exclude every supposition inconsistent therewith, to warrant a conviction in a criminal case.

INSTRUCTION IN CAPITAL CASE THAT STRONG MOTIVE MUST BE PROVED for the commission of the murder by the defendant, to justify his conviction, if the evidence is circumstantial, and does not show his guilt with absolute certainty, is properly refused.

ERROR to the Jackson circuit court. The opinion states the case.

W. Quarles, J. G. Marshall, and A. M. Brown, for the plaintiff in error.

H. O'Neal, for the state.

BLACKFORD, J. Indictment against the defendant below for the murder of his wife. Plea not guilty. Petition for a change of venue refused. Verdict for the state. Motion for a new trial overruled, and judgment on the verdict. The errors assigned are: 1. That the defendant's petition for a change of venue should have been granted; 2. That certain instructions to the jury asked for by the defendant and refused, ought to have been given.

It has been decided at this term, in a case like the present, that the refusal of the court to change the venue can not be assigned for error: *Findley v. The State* [*ante*, 557.] In examining the second error assigned, it must be noticed that the evidence is all circumstantial. The following is the first instruction refused: "Every circumstance material in this case must also be proved beyond a rational doubt, or it is the duty of the jury to discard such circumstance in making up their verdict." This instruction ought to have been given. We think that if the jury, in making up their minds from circumstantial

evidence, have a rational doubt as to the existence of any one of the material circumstances attempted to be proved, that circumstance ought not to have any influence with them in forming their opinion respecting the guilt or innocence of the defendant; or, in the language of the instruction asked, the jury ought, in such case, "to discard such circumstance in making up their verdict." Mr. Starkie says that it appears to be essential to circumstantial proof that the circumstances from which the conclusion is drawn should be fully established. If the basis be unsound, the superstructure can not be secure. The party upon whom the burden of proof rests, is bound to prove every single circumstance which is essential to the conclusion, in the same manner and to the same extent as if the whole issue had rested upon the proof of each individual and essential circumstance: 1 Stark. Ev. 571. These remarks are evidently correct; and they show that the instruction under consideration ought to have been given.

The following is the second instruction refused: "If the jury believe, from all the circumstances proved in the case, that a person other than the defendant might have murdered the wife of the defendant, or she might have destroyed her own life, and all such circumstances thus proved would be consistent with such a supposition, they ought to find their verdict in favor of the defendant, although they might believe the defendant more likely to be the murderer than any other person." There may be some doubt as to the exact meaning of this instruction. If it mean, that if the jury believed from the evidence, that it was possible some other person than the defendant committed the murder, they ought to find for him, no matter how strong, consistent with such possibility, the evidence might be for the state, the instruction was correctly refused. It appears to us that the instruction is so worded, that the jury might have understood it in the sense which we have mentioned, and in which it is objectionable.

The following is the third instruction refused: "Circumstantial evidence, to be sufficient for a conviction in this case, ought to be of a conclusive tendency; that is, its tendency ought to be not only to convince the minds of the jury of the guilt of the defendant, but to exclude the supposition either that the deceased destroyed her own life, or that a person other than the defendant committed the murder." Considering this instruction to mean, that the evidence in the case should tend to convince the jury of the defendant's guilt, and to exclude every

supposition inconsistent with his guilt, there is no reason that the state should object to it.

The last instruction refused is as follows: "In cases of alleged murder, proved alone by circumstances, if those circumstances are not conclusive as to the guilt of the defendant, there ought to be a motive, and that a strong one, proved, which might have impelled the defendant to commit the act; and if such proof is not made, the jury ought to acquit the defendant." We think the jury might have understood, by this instruction, that if the evidence did not show the defendant's guilt with absolute certainty, they must acquit him, unless there was proof that he had a strong motive to commit the murder. And if the instruction might be so understood by the jury, it was rightly refused. We consider the following language on the subject, by the writer to whom we have already referred, as correct: "The legal test is the sufficiency of the evidence to satisfy the understanding and conscience of the jury. On the one hand, absolute, metaphysical, and demonstrative certainty, is not essential to proof by circumstances. It is sufficient if they produce moral certainty to the exclusion of every reasonable doubt:" 1 Stark. Ev. 577. It is easy to conceive that the evidence in the case now before us might not be sufficient to produce, on the minds of the jury, an absolute certainty of the defendant's guilt, nor to prove that he had any motive to commit the crime charged, and yet it might be strong enough to satisfy the jury, beyond a reasonable doubt, that he was guilty. It appears to us, therefore, that there was no error in refusing this instruction.

We have not considered how the second and last of these instructions would be understood by a member of the legal profession, as it is a sufficient objection to them, that they might convey to the mind of an unprofessional man, of ordinary capacity, an incorrect view of the law applicable to the cause. The record shows that a general charge was given to the jury, but we are not informed what it was.

By COURT. The judgment is reversed, and the verdict set aside. Cause remanded, etc.

EVIDENCE REQUIRED TO JUSTIFY CONVICTION IN CRIMINAL CASE: See *Finley v. State*, ante, 557, and note. That where the evidence in a criminal case is circumstantial and the jury are satisfied of the prisoner's guilt beyond a reasonable doubt, they should convict him, the principal case is cited in *People v. Kelly*, 28 Cal. 426. Every essential ingredient of the offense must be proved beyond a reasonable doubt, to warrant a conviction: *People v. Phippe*, 29 Id. 333; also citing *Sumner v. State*.

SANDERS v. JOHNSON.

[6 BLACKFORD, 50.]

REFUSAL OF DEFENDANT'S MOTION FOR LEAVE TO WITHDRAW PLEA of the statute of limitations, where such motion is not made until the jury has been partly sworn, and if granted would give the defendant the privilege of opening the case, is not an improper exercise of the discretion of the court.

EXCLUSION OF WITNESSES FROM COURT-ROOM IS DISCRETIONARY with the court, and where the defendant, before examining his witnesses, moves to exclude the plaintiff's witnesses, who have not yet testified, but does not include his own witnesses, a denial of such motion is not improper.

IMPROPER SUPPRESSION OF DEPOSITION IS WAIVED by introducing another deposition of the same witness containing the same testimony.

EVIDENCE, IN ACTION FOR SLANDER, of prior reports charging the plaintiff with the same crime imputed to him by the defendant, without any offer to explain their extent or effect upon the plaintiff's character, is inadmissible in mitigation of damages under a plea of justification.

EVIDENCE OF CIRCUMSTANCES CREATING SUSPICION OF PLAINTIFF'S GUILT of the offense imputed, but not proving such guilt, is not to be considered in mitigation of damages in an action for slander for charging the plaintiff with a crime, to which justification is pleaded, where there is no proof of such glaring misconduct by the plaintiff as to cause the defendant to believe the charge and his plea of justification to be true.

DAMAGES MUST BE PALPABLY EXCESSIVE IN SLANDER, to warrant setting aside the verdict, where the charge is of an infamous offense, and has been publicly and repeatedly made, and justification pleaded with little or no evidence to support it.

APPEAL from Monroe circuit court. The opinion states the case.

O. P. Hester and J. S. Watts, for the appellant.

G. G. Dunn, for the appellee.

DEWEY, J. Johnson sued Sanders in slander for charging him with perjury. The defendant pleaded: 1. The general issue, which, after two continuances from term to term, he withdrew; 2. The statute of limitations, upon the traverse of which there was issue; 3. Three pleas of justification, alleging as many distinct instances of perjury against the plaintiff, committed on different occasions. *De injuria* replied to each of these pleas, and issues formed thereon. After a part of the jury was sworn, the defendant asked leave of the court to withdraw the plea of the statute of limitations; leave was refused. When the trial commenced, both parties claimed the right to begin with the testimony, and to make the opening argument. The

Court awarded it to the plaintiff. At the time of swearing his witnesses, and before they were examined, the defendant moved the court to remove such witnesses as the plaintiff still held in reserve, so that they might not hear the defendant's witnesses. The motion was overruled. The court suppressed one of the defendant's depositions; but another deposition, made by the same witness and containing the same matter as that rejected, was read to the jury by the defendant. The defendant offered to prove, in mitigation of damages, that the same charge laid in the declaration had been reported by others against the plaintiff before the defendant made it. The testimony was rejected. The defendant moved the court to give several instructions to the jury, which, so far as they were pertinent to the issues, were given, with the exception of the following, viz.: "If the circumstances proved in the cause create a suspicion that the plaintiff committed perjury, but do not amount to proof of his guilt, the jury should consider them in mitigation of the damages." This charge the court refused. The jury found a verdict for the plaintiff, and assessed his damages at two thousand seven hundred and thirty-six dollars. A motion for a new trial was overruled, and final judgment rendered upon the verdict.

In regard to the motion for leave to withdraw the plea of the statute of limitations, admitting this court to possess a supervisory power over the discretion of the court below in permitting or refusing the withdrawal of a plea after issue—a point which we do not decide—we see no reason for supposing the discretion was improperly exercised on the present occasion. The defendant suffered the plea to stand at issue until the jury was partly sworn. The plaintiff, consequently, was compelled to keep his witnesses in attendance; and as this burden had been thrown upon him by the defendant, it would have been unreasonable to deprive him of the privilege, resulting from the issue as it then stood, of opening and closing the cause to the jury. Courts, usually, on the application of either party, cause the witnesses to be separated, so that they can not hear each other testify. But this is a matter of discretion; and it does not seem to have been unsoundly exercised in refusing the request of the defendant in this instance, that a part of the plaintiff's witnesses only should withdraw. It would have been more reasonable had he included his own witnesses in his motion.

As to the suppression of one of the defendant's depositions, we have not inquired whether there was sufficient cause for it or not. Because, admitting it to have been improperly suppressed,

the defendant waived the error by introducing another deposition, by the same witness, testifying to the same facts contained in that which was rejected. He sustained no injury by the decision of the court, right or wrong. The rejection of the evidence offered by the defendant of the existence of a prior report, imputing to the plaintiff the same crime with which the defendant afterwards charged him, raises a question of some difficulty.

In the case of *Leicester v. Walter*, 2 Camp. 251, which was an action for a libel in charging the plaintiff with having committed an infamous offense, the defendant was permitted to give in evidence in mitigation of damages, under the general issue, that previous to the publication of the libel, "there was a general suspicion of the plaintiff's character and habits; that it was generally rumored that such a charge had been brought against him; and that his relations and former acquaintance had, on this ground, ceased to visit him." This evidence was admitted for the reason that the defendant had not justified, and because it established the character of the plaintiff to be "in as bad a situation before as after the libel." In the subsequent case of *Snowden v. Smith*, 1 Mau. & Sel. 287, n., in which there was a justification, it was ruled that prior reports, imputing the same crime to the plaintiff with which the defendant had charged him, should not go in evidence to affect the amount of damages. The judge who tried the cause distinguished it from *Leicester v. Walter* on the ground of the justification. In *Kirkham v. Oxley*, cited in 2 Stark. Ev. 217—an action of slander for accusing the plaintiff with larceny—evidence of his "bad character" was allowed in mitigation of damages, though the defendant had justified. This decision has been thought to conflict with that of *Snowden v. Smith*. But such does not seem to be the fact. There is a clear difference between a report imputing to a man the commission of a specific crime, and the badness of his character. The report may be unfounded, it may not gain credit, it may not injure the character of the individual to whom it refers; at least, it is substantially falsified by a verdict against the justification alleging the same crime. But a bad character might not, and if it be generally bad could not, be materially bettered by such a verdict. This consideration, together with the presumption that a man is always prepared to vindicate his general character, renders it probable that the general bad character of the plaintiff may, even under a justification, be given in evidence with a view to lessen the damages. We do not, however, decide that question.

In an action of slander for charging the plaintiff with unnatural practices, decided still later than those above quoted, — *v. Moore*, 1 Mau. & Sel. 285, evidence of the existence of reports that the plaintiff had been guilty of “similar practices,” was held to be admissible in diminution of the damages, on the ground that such evidence would “disparage the fame” of the plaintiff, and destroy his right “to the same measure of damages with one whose character is unblemished.” There does not appear to have been a justification in this case; and the “similar practices” could not allude to the specific slander laid in the declaration; they must have had reference to something else of like nature, and, therefore, must have had a bearing upon the character of the plaintiff independently of the wrong for which the action was brought. Indeed, this evidence fell but little, if any, short of that of general bad character. In the case of *Wailhman v. Weaver et al.*, Dow. & Ry. N. P. Cas. 10, which was an action for a libel, Abbott, C. J., ruled that, under the general issue, evidence of facts short of a complete justification of the alleged libel could not be given in evidence to mitigate the damages by negativeing the malice, though he recognized the authority of *Leicester v. Walter*, on the ground that the rumors, permitted to be proved in that case, tended to show that the plaintiff had previously lost his character, and had sustained no injury by the libel. This court has heretofore held that, under the general issue, the “strong suspicions” of the defendant, that the words spoken by him were true, could not be received to affect the verdict, though a general suspicion of the plaintiff’s guilt might: *Henson v. Veatch*, 1 Blackf. 369.

None of these decisions go further than to establish the doctrine, that, under the general issue in slander, general rumors, or a general suspicion of the guilt of the plaintiff of the crime imputed to him by the defendant, may be given in evidence in mitigation of damages. They do not sustain the loose position assumed by the plaintiff in error, that any reports, however limited in circulation or harmless in effect, which may have preceded the slander uttered by him, imputing the same crime, are competent evidence on the question of damages even under a justification. To admit such a principle would be to concede that the very slander which ought to be silenced forever by the failure of the justification, may, nevertheless, become the rightful means of depriving the injured person in a great measure of the benefit of his action, and of leaving his character at last to the mercy of an artful slanderer. The case of *Snowden v.*

Smith, supra, is in point, that the mere report is not admissible evidence when a justification is pleaded. Several decisions in Massachusetts sustain the same doctrine; indeed, they go further, and exclude such evidence under the general issue; though they recognize the propriety of admitting the general bad character of the plaintiff, either under that issue or a plea justifying the slander: *Walcott v. Hall*, 6 Mass. 514 [4 Am. Dec. 173]; *Alderman v. French*, 1 Pick. 1 [11 Am. Dec. 114]; *Bodwell v. Swan and Wife*, 3 Id. 376; *Larned v. Buffinton*, 3 Mass. 546 [3 Am. Dec. 185]. We, however, only decide that the existence of prior reports charging the plaintiff with the same crime imputed to him by the defendant, without any offer to explain their extent or effect upon the character of the former, is not, under a plea of justification, legal evidence in mitigation of damages. The circuit court committed no error in rejecting the evidence offered by the defendant.

The next inquiry is one, also, of some difficulty. It is this, should the jury have been instructed, that if the circumstances proved on the trial were such as to cause suspicion, but not conviction, that the plaintiff had committed perjury, they should be considered in the estimation of damages? In the case of *Larned v. Buffinton, supra*, which was an action of slander for charging the plaintiff with horse-stealing, pleas, general issue and justification, the supreme court of Massachusetts held, that under the circumstances of that case, nothing short of absolute proof of the truth of the words spoken should operate to lessen the amount of the verdict. There may, perhaps, as was remarked by the court on that occasion, be instances in which, though the justification is not supported, the misconduct of the plaintiff may have been so glaring as to give the defendant reason to believe that the charge made by him, and his plea justifying it, are true; in which case, it may be proper for the jury to consider the circumstances developed on the trial in mitigation of the damages. We have, however, carefully examined the evidence in the cause before us, and do not think it presents an instance of the character alluded to. We see nothing in it, which rendered it the duty of the circuit court to give the instruction asked for.

Nor are we prepared to say there should have been a new trial on the ground of excessive damages. Courts seldom disturb verdicts on the score that compensation for an injury to character has been estimated by too high a standard. Taking into consideration the infamous nature of the crime charged upon

the plaintiff, that the accusation was made publicly and repeatedly in large assemblages of the people when he was canvassing for an important office; that three distinct charges of perjury were deliberately made against him on the records of the court; that with regard to one plea, there was no evidence at all, and very little in support of the other two; we do not feel authorized to pronounce the damages so palpably excessive as to defeat the verdict.

Ry Court. The judgment is affirmed, with one per cent. damages and costs.

EXCLUSION OF WITNESSES FROM COURT-ROOM, POWER OF COURT AS TO: See *Commonwealth v. Knapp*, 20 Am. Dec. 491.

EVIDENCE OF PRIOR REPORTS OF SIMILAR NATURE to words spoken, admissibility of in mitigation of damages in actions for slander: See *Cook v. Barkley*, 2 Am. Dec. 343; *Easterwood v. Quin*, 3 Id. 700; *Wolcott v. Hall*, 4 Id. 173; *Treat v. Browning*, 10 Id. 156; *Alderman v. French*, 11 Id. 114, and note; *Calloway v. Middleton*, 12 Id. 409; *Anthony v. Stevens*, 13 Id. 497; *Gilman v. Lowell*, 24 Id. 96. As to the admissibility of evidence of the plaintiff's general bad character in mitigation of damages in an action for slander, the principal case is cited in *Clark v. Brown*, 116 Mass. 509.

EVIDENCE IN MITIGATION OF DAMAGES WHEN JUSTIFICATION PLEADED in slander, admissibility of: See *Larned v. Buffinton*, 3 Am. Dec. 185; *Wormouth v. Cramer*, 20 Id. 706. As to the admissibility of evidence in mitigation of damages under the general issue in such actions generally, see *Gilman v. Lowell*, 24 Id. 96, and note, collecting the previous cases in this series on that point, and *Tailow v. Jaquett*, 26 Id. 399; *Purple v. Horton*, 27 Id. 167, and note.

EXCESSIVE DAMAGES AS GROUND FOR NEW TRIAL IN SLANDER: See *Neal v. Lewis*, 1 Am. Dec. 640; *Coleman v. Southwick*, 6 Id. 253; *Douglass v. Tousey*, 20 Id. 616; *Davis v. Ruff*, 34 Id. 584.

. **CASES**

IN THE

COURT OF APPEALS

OF

KENTUCKY.

McGEE v. ANDERSON.

[1 B. MONROE, 187.]

SHERIFF LEVYING ON SEVERAL ARTICLES, ONE OF WHICH IS EXEMPT FROM execution, is not liable in trespass therefor, where the debtor fails to elect before levy which of them he will claim as exempt.

SHERIFF REFUSING TO ALLOW CLAIM OF EXEMPTION made on day of sale and proceeding with the sale, where several articles are levied on, one of which may be claimed as exempt, does not become a trespasser *ab initio* unless the debtor tenders in lieu of that claimed other property which is of equal value, or palpably sufficient to discharge the debt, or which is the only property which the sheriff could have levied on if the exemption had been claimed before levy.

ERROR to the Calloway circuit court. The opinion states the case.

J. T. Morehead, for the plaintiff.

By Court, MARSHALL, J. This was an action of trespass, by McGee against Anderson, for taking and converting the plaintiff's mare. The defendant justified under an execution against the plaintiff and others, by virtue of which he, as sheriff, had taken and sold the mare. The plaintiff replied that at the time, etc., he was a *bona fide* housekeeper, with a family, and had but two animals of the horse kind, viz., two mares, and that, electing to keep the mare levied on, under the statutory exemption of one work beast, he had on the day of sale, and at and before the sale, tendered the other mare to the sheriff, to be sold in lieu of the mare levied on, and which he elected to keep. To this the defendant rejoined, that at the time, etc., the plaintiff had one

yoke of oxen, besides, etc.; and upon demurrer to this rejoinder being overruled, the plaintiff having failed to make farther answer, a judgment in bar was rendered against him, which he now seeks to reverse.

The question made by this state of the pleading, arises on one of the provisos contained in the thirteenth section of the general execution law of 1828 (Stat. L. 641), by which it is declared, among other things, that one work beast or yoke of oxen (of a *bona fide* housekeeper, with a family) shall be exempt from execution. If the execution debtor, having three or more articles of property, one of which only is exempt from execution, be considered as having the right to elect which he will retain, there was no such election in this case, before the levy, and the sheriff certainly was not a trespasser, originally, by the act of levying on one of the articles, leaving two others, one of which might satisfy the privilege of exemption; and, conceding the right of election still to have remained in the debtor, until the sale, it gave him no right to impede the execution, or to render it less effectual than it would have been, or might have been made by the sheriff, if the debtor's election had been made before the levy. We are of opinion therefore, that the refusal of the sheriff to surrender the article levied on, in allowance of an election made on the day appointed for its sale, and his then proceeding to sell such article, would not be wrongful, so as to make him a trespasser *ab initio*, unless the debtor should tender to him for sale, in lieu of the article levied on, such other articles as he might, in the first instance, have seized for the satisfaction of the debt, or so much thereof as was certainly and palpably sufficient to discharge the debt, or as was at least equal in vendible value to the article then claimed to be exempt.

Applying these principles to the pleadings before us, the defendant was clearly entitled to a judgment on the demurrer, because the replication did not show either that the mare tendered in lieu of that which had been levied on, was the only property on which the sheriff might have levied, if the debtor's election had been made in the first instance, or that it was of sufficient value to discharge the debt, or that it was of equal value with that which was claimed from the sheriff. The replication was therefore insufficient to make the sheriff a trespasser, and as the rejoinder certainly did not admit any of these alternative facts which were omitted in the replication, the judgment for the defendant was right, whether the rejoinder be in itself defective or

not. Without, therefore, inquiring into the goodness of the rejoinder, the judgment is affirmed.

OFFICER DISCOVERING PROPERTY TO BE EXEMPT, AFTER LEVY, MAY REFUSE TO SELL: *Potts v. Commonwealth*, 20 Am. Dec. 213. That a debtor must make his election of exempt property, at the time of the levy or within a reasonable time thereafter, or he will be deemed to have waived the exemption, is held, citing *McGee v. Anderson*, in *Borland v. O'Neal*, 22 Cal. 507.

WATSON v. CRESAP.

[1 B. MONROE, 196.]

PARTY PAYING DEBT WITH COUNTERFEIT BILL is liable immediately, upon an implied promise or warranty that it was genuine, whether he knew it to be counterfeit or not, and a return of the bill before bringing the action is unnecessary.

MONEY PAID FOR COUNTERFEIT BILL MAY BE RECOVERED in an action for money had and received, and the bill being worthless, a return of it need not be tendered, it seems, before suing.

TESTIMONY THAT BILL IS COUNTERFEIT, FROM MERCHANTS who have been in the habit of receiving and paying away genuine bills on the same bank, is competent.

APPEAL from Hickman circuit court. The case appears from the opinion.

Husbands, for the appellants.

Owsley, for the appellees.

By Court, EWING, J. This is an action of assumpsit, brought by the appellees against the appellants, for the consideration paid for a hundred-dollar bank bill, on the bank of the United States, passed by the appellants to the appellees, and which is alleged to be a counterfeit. The suit was brought in a short time after the bill was passed to the appellees, and the counterfeit note is exhibited in the record. The declaration contains three counts, the first a special count, which alleges that the defendants were indebted to the plaintiffs two hundred dollars, and paid them in part, in a hundred-dollar bill on the United States bank, which they assumed to be genuine, when the same was counterfeit and worthless. The second and third are counts in *indebitatus assumpsit*; the second, for property and bank bills sold and delivered; the third, for money had and received for the use of the plaintiffs. We think the declaration is substantially good, and the proof was competent, and justified the verdict of the jury. It must be presumed that he who passes a bill as

money, passes it as genuine, and the law implies an assumpsit or warranty that it is so: 2 Johns. 458; 15 Id. 240.' And if the bill should be counterfeit and worthless, this implied promise is immediately, upon passing the bill, broken, and an action lies for its breach; nor does it matter whether he who passes it knows that it is counterfeit or not: 2 Johns., *supra*. The action is not an action for a fraud, but for the breach of promise implied by law. And to sustain this form of declaring, it would certainly be unnecessary to prove that the note was tendered back, as it goes for a breach of promise and not for a restitution of the consideration upon a disaffirmance of the contract of payment.

As the first count, in the case under consideration, is a count on the implied promise, the proof justified the recovery without any evidence that the bill was tendered back to the defendants before suit brought; and the motion to instruct the jury, as in case of a nonsuit, was properly overruled. We are also satisfied, that if money or other bills, which pass and are received as money, be the consideration given for a counterfeit bill, that it may be recovered back on an *indebitatus* count, for so much money had and received. Payment for such a bill must be regarded as a payment by mistake for a thing of no value, but which was, at the time it was received, believed to be, and imported on its face to be of intrinsic worth: 2 Johns. 458.

But this form of declaring proceeds on the ground of a disaffirmance of the contract and a restitution of the thing given in exchange. It is an equitable remedy, and to entitle the plaintiff to recover, if anything of value has been received, it must be shown that it was tendered back before the action was brought. A counterfeit bill is certainly of no intrinsic value, it would be as worthless in the hands of the defendants as in those of the plaintiffs, and according to the rule laid down, it would seem unnecessary to show that it was tendered back, even in this form of declaring. But whether it was or not, it is not now necessary to determine, as the recovery was proper on the first count. We are also equally clear that the testimony adduced to prove that the signature to the bill was not the handwriting of the president of the bank, and that the bill was a counterfeit, was competent. If the testimony of a casual correspondent may be received as competent to prove handwriting, much more may the testimony of a merchant who has been in the habit, in the course of his business, of receiving, scrutinizing,

and paying away genuine bills upon the same bank, be received as competent.

The judgment of the circuit court is affirmed with costs.

PAYMENT IN COUNTERFEIT NOTE, effect of negligence in returning the note: *Raymond v. Baar*, 15 Am. Dec. 603.

PETERS v. ALLISON AND FERGUSON.

[1 B. MONROE, 232.]

PURCHASER UNDER VERBAL CONTRACT BEING IN POSSESSION by his agent, the vendor or his grantee can not maintain ejectment without proof of a demand and refusal by the purchaser or agent or of a holding adversely before suit brought or demise laid.

ADVERSE HOLDING OR DEMAND AND REFUSAL are not to be implied from a defense to an ejectment brought by the vendor against a tenant of the purchaser in possession under a verbal contract of purchase.

REFUSAL TO PERMIT DISCONTINUANCE AS TO TENANT in possession, where his landlord has been admitted to defend in an action of ejectment, for the purpose of making him a witness against his landlord, is not error, because a discontinuance as to the tenant is a discontinuance of the whole action.

ERROR to the Clarke circuit in an action of ejectment. The questions involved sufficiently appear from the opinion.

Turner, for the plaintiffs.

Apperson, for the defendants.

By Court, EWING, J. Allison having the possession, as the sexton and agent of the church, which obtained the possession under a purchase from Mason, though verbal and held, looking to him for a title, neither Mason nor his vendee had a right of entry, or could maintain an action of ejectment therefor, without a demand and refusal on their part, or that of their sexton, or proof of a holding adversely, before suit brought or demise laid. And the fact of an adverse holding, or of a demand, can not be implied from a defense to the action, or a resistance to the lessor's title or right to recover, in the trial, on any ground. It can not, and ought not to be inferred, from the fact that the defendant, after he has been made to assume an antagonistical attitude, by a suit brought against him, resists the right to recover against him on any ground, that he claimed or held adversely before he was sued or the demise was laid. The demand proven, is not shown to have been a demand on behalf of

Mason or his vendees. He who demanded the possession is not shown to have had any right to the possession.

The court was also right in refusing permission to the lessors of the plaintiff to discontinue, as to the tenant in possession, for the purpose of making him a witness against Ferguson, who had been permitted to defend as *quasi* landlord, on the part of the church. The tenant being sued, as tenant in possession, had a right to be admitted a defendant, that he might defend his possession. His possession was the object of the suit, nor could a suit have been commenced at all, but against the tenant in possession, and the object of the controversy is to try the right to his possession. The landlord being admitted to enter himself as a defendant, does not and can not have the effect to expand the controversy. He is allowed to defend for and on behalf of the tenant, but the defense is still restricted to the possession or right to the possession of the tenant, and can no more be prosecuted separately against the landlord, without and against the will of the tenants, than it could originally have been instituted against the landlord, who was not, at the time, in possession. A discontinuance of the suit, as to the tenant, would have been a discontinuance of the whole cause of action, not only against the tenant but against the landlord: *Crockett v. Lashbrook*, 5 Mon. 540, 541 [17 Am. Dec. 98].

Judgment affirmed, with costs.

POSSESSION UNDER CONTRACT OF SALE IS OR IS NOT ADVERSE, WHEN: See *Greene v. Munson*, 31 Am. Dec. 605; *Valentine v. Cooley*, 33 Id. 166; *Larkin v. Bank of Montgomery*, Id. 324; *Meadows v. Hopkins*, Id. 140, and cases cited in the notes thereto. Adverse possession will not be presumed against one residing on land without proof of some tortious act on his part or a refusal to deliver possession: *Pownal v. Taylor*, 34 Id. 725.

BRINAGAR v. PHILLIPS.

[1 B. MONROE, 283.]

SURETY IS NOT RELEASED BY MERE VERBAL ASSENT TO INDULGENCE to the principal for a specified time, without the surety's consent, there being no consideration or new security taken for such assent.

ERROR to Louisville chancery court. The principal question in the case appears from the opinion.

Thurston, for the plaintiff.

Loughborough, for the defendants.

By Court, MARSHALL, J. The principal question presented in this case, and that upon which a reversal or affirmance of the decree exclusively depends, is, whether a surety is released by an indulgence granted to the principal debtor upon an agreement or rather a mere verbal assent to give indulgence for a specified time, at the request of the principal, without any consideration real or apparent, without any new security taken, or even contemplated, and without the knowledge or assent of the surety. This is perhaps the first occasion on which this court has been called on to decide the question, as to the release of the surety in the precise form in which it has just been stated; but the doctrine involved has been discussed and analyzed in many cases, in this and other courts, and the plain principle to be adduced from these discussions and decisions is, that the surety is released, when by an arrangement between the creditor and principal debtor, without his consent, his right to compel the creditor to the immediate coercion of the debt from the principal, or what is the same thing in effect, his right to make immediate payment to the creditor and in his name and right to coerce payment from the principal debtor is impaired, and that he is, in such cases, released, because his right, as above specified, is impaired by the arrangement, when the creditor is thereby precluded from immediately coercing the debt: *Cooper and Wife v. Fisher and Smith*, 7 J. J. Marsh. 396; *Sneed's Ex'r v. White*, 3 Id. 527 [20 Am. Dec. 175]; *Kirk v. Baldwin*, 2 Johns. Ch. 556, and cases there cited; *McLemore v. Powell*, 12 Wheat. 554; *Norton etc. v. Robertson*,¹ 4 Mon. 491; *Robertson v. Offutt*,² 7 Id. 540.

Could the creditor then, in this case, notwithstanding the verbal arrangement supposed in the question above stated, have resorted to the immediate legal coercion of the debt whenever after it became due the surety should have required him to do so? We are decidedly of opinion that he could, and that the arrangement or the assent to the requested indulgence would not only not have constituted any legal bar to such immediate coercion (which we do not decide to be essential), but that it would not, either in equity or in good conscience, present any obstacle to an immediate call and suit for the debt, at the requisition of the surety, and when the failure to sue might discharge the surety and jeopard the entire demand. For the fair presumption would be that such an assent to the indulgence requested, being given from mere motives of benevolence, without

1. *Norton v. Roberts*.

2. *Robinson v. Offutt*.

consideration or prospect of advantage to the creditor, was intended for the benefit of the surety as well as of the principal, and was founded on his presumed assent, and that, therefore, whenever he should, in fact, dissent and claim his rights under the contract, the creditor would be free from every obligation which could arise from an assent purely gratuitous and benevolent, and founded upon the presumption of a fact which, as afterwards ascertained, did not exist.

The consequence of this view is, that the right of the surety not being actually impaired to any extent by the arrangement or assent supposed, he is not released upon the ground of the equitable principle which has been assumed as deducible from the cases; and indeed, it being admitted on all sides and in all the cases, that mere delay to coerce the debt, without any words expressing an intention or assent to give delay for a particular period, would not release the surety, it seems obvious that to decide that the mere verbal expression of such intention or assent, without consideration or new security of any kind, would be effectual to discharge the surety and perhaps with the loss of the debt, would be giving a consequence to the very light shadowy distinction which might be drawn between the cases, wholly disproportioned to any actual and substantial difference between them. All the cases above cited, except the two last, we regard as strong and almost direct authorities in favor of the conclusion to which we have come in this particular case, and the two last cases, when properly considered, do not, as we think, essentially contradict it. It is only deemed necessary to add, in this case, that in our opinion the proviso to the eighth section of the act of February 2, 1837 (Ses. Acts, 106), does not apply to this case, but only to cases in which the jurisdiction of the court is founded upon the right of subjecting property or debts, etc., of a non-resident, and the jurisdiction to decree in this case, is unaffected by the said proviso.

Wherefore, the decree is reversed, and the cause remanded with directions to render a decree in favor of the complainants for the amount of the demand set up in the bill, with interest, etc.

RELEASE OF SURETY BY INDULGENCE TO PRINCIPAL: See *Everett v. United States*, 30 Am. Dec. 534; *Tremper v. Hemphill*, 31 Id. 673; *Cooper v. Wilcox*, 32 Id. 695, and cases cited in the notes.

WALL v. HILL'S HEIRS.

[1 B. MONROE, 290.]

HEIRS OF GRANTOR WHO WAS OF UNSOUND MIND at the time of conveyance, may recover in ejectment against the grantee, without restitution of the purchase money.

GRANTEE, IN CONVEYANCE VOIDABLE ON GROUND OF GRANTOR'S INSANITY, is ESTOPPED, in an action of ejectment brought by the grantor's heirs, to deny the grantor's title.

INQUISITION AFTER MAKING OF DEED FINDING GRANTOR INSANE, and legally incapable of contracting at the time of the execution of such deed, though *ex parte*, is *prima facie* evidence against the grantee in ejectment brought by the grantor's heirs.

CAPACITY TO TRANSACT BUSINESS "WITH JUDGMENT AND DISCRETION," is not necessary to be shown to support the validity of a deed of a grantor against an inquisition, subsequent to the execution of the deed, finding him to have been of unsound mind and incapable of managing his affairs at that time; as indiscretion and defect of judgment may exist without legal incapacity.

PREPONDERANCE OF EVIDENCE ON DEFENDANT'S PART is not necessary to overcome a *prima facie* case in favor of the plaintiff's right to recover in ejectment; equiponderance of evidence is sufficient.

ERROR to Garrard circuit. The opinion states the case.

Owsley and Turner, for the plaintiff.

Bradley, for the defendants.

By Court, ROBERTSON, C. J. William Wall seeks the reversal of a judgment of eviction, rendered against him in an action of ejectment by the heirs of John Hill, deceased, who in his lifetime, to wit, in the year 1834, had conveyed the land in contest to Robert Burnsides, under whom Wall holds. The only ground for claiming the right of entry, asserted by Hill's heirs since his death, which occurred in the year 1839, was his alleged incapacity to make a binding conveyance at the date of the deed to Burnsides, and which they attempted to sustain, and did establish successfully in the opinion of the jury, by an inquisition in 1838, finding that he was then, and had been from 1822, "of unsound mind," and "incapable of managing his own affairs with ordinary prudence," and by the concurrent testimony also of sundry witnesses examined on the trial.

Admitting the fact of legal incapacity at the date of the conveyance to Burnsides, we have no doubt that Hill's heirs had, at his death, a right of entry, and might, therefore, maintain this action upon the refusal of Wall, as proved, to surrender the possession to them: Litt. Sel. Cas. 405; Co. Lit. 247 b; Booth on Real Actions, 189; *Thompson v. Leach*, Comb. 468.

Notwithstanding the erroneous opinion, once prevalent, that a man could not, even in a civil case, *ex contractu*, stultify himself, courts of equity established the practice of avoiding the contracts of persons of unsound mind, upon bills filed by their committees, after inquisition of unsoundness; and in all such cases the chancellor, acting upon equitable principles according to a sound discretion, would decree only such restitution as would place the parties as near as possible *in statu quo*. But the right of entry by the heir was legal and perfect, without any restitution of the consideration paid to the ancestor; and an equitable right to such restitution was not available in an action of ejectment, in which legal rights only are triable.

We are also of the opinion that Wall, holding and having entered under a voidable conveyance from Hill, is estopped in this action to deny Hill's title to the land, and should upon the election by the heirs to avoid the deed, be deemed a *quasi* tenant at will. Nor do we doubt that, as decided by the circuit judge, the inquisition in this case, though in a great degree *ex parte*, was *prima facie* evidence against Wall, and without any superfluous approval thereof by the court to which it was returned. And we are of the opinion also, that the evidence on the trial preponderated in favor of the verdict. But nevertheless, it does seem to us that the circuit judge went too far when he instructed the jury that before they could find for Wall "on the score of Hill's capability to understandingly transact his own business with judgment and discretion, they should be fully satisfied that the evidence of defendant outweighs the said inquisition and all the other evidence which has been added by the plaintiff in this case, in regard to the unsoundness of the mind of the said John Hill, sen."

"Discretion" and "judgment" are rather too comprehensive and indeterminate. Indiscretion and defect of judgment may exist without legal incapacity to make a valid contract; and it is not true that the defendant's testimony should "outweigh" that of the plaintiff. If the evidence be equiponderant, the jury should find for the defendant. Before a plaintiff can be entitled to recover, his evidence of right must "outweigh" that of the defendant.

As, therefore, this instruction may have been delusive and injurious, we must, on that ground, reverse the judgment and remand the case for a new trial.

INSANITY, RIGHT OF GRANTOR OR HIS HEIRS OR REPRESENTATIVES TO AVOID DEED ON GROUND OF: See the note to *Jackson v. King*, 15 Am. Dec.

364-367. See also *Owings' case*, 17 Id. 311; *Harrison v. Lemon*, 23 Id. 376; *Bensell v. Chancellor*, 34 Id. 561. Inquisition of lunacy after contract is made, effect of: See *Jackson v. King*, 15 Id. 354. See generally as to the effect of an inquisition of lunacy as evidence, *Den v. Clark*, 18 Id. 417; *L'Amoureux v. Crosby*, 22 Id. 655; *Hutchinson v. Sandt*, 26 Id. 127, and cases cited in the notes thereto. The deed of a lunatic at common law was void: *Matter of Desilver*, 28 Id. 645.

MILLION v. COMMONWEALTH FOR THE USE OF WITHERS.

[1 B. MONROE, 310.]

EXECUTION FIRST LEVIED HAS PRIOR LIEN though it be a junior execution, and comes last to the officer's hands, where different executions against the same defendant are delivered to different officers for service.

EXECUTION FIRST RECEIVED BY OFFICER HAVING SEVERAL EXECUTIONS against the same defendant placed in his hands at different times, must be first levied and paid.

SEVERAL EXECUTIONS DELIVERED TO DIFFERENT DEPUTIES OF SAME SHERIFF, at different times, must be regarded as delivered to the sheriff personally, for the purpose of determining the right to priority of levy and satisfaction, and the writ first delivered to any of the deputies must be first paid out of the proceeds of a sale made by any other of the deputies on a writ subsequently received, if the prior writ is brought to the notice of the deputy making the sale before he has actually paid over the money, and for a refusal so to apply the proceeds the sheriff is liable on his bond.

ERROR to Harrison circuit. The case is stated in the opinion.

Trimble, for the plaintiff.

Curry, for the defendant.

By Court, EWING, J. This was an action of debt against Million, a sheriff, for a breach of his official bond. The facts were agreed, from which it appears that Million was sheriff of Harrison county and had appointed two deputies, one of whom, J. Henry, was to perform the duties of the office on the east side of Licking, which intersected the county from south to north, and the other, M. Moon, was to attend to the duties on the west side of the river; that an execution of *fi. fa.* was placed by the relator in the hands of Henry on the fourteenth of June, 1839, in his favor against Manson and Aaron Ashbrook, the former of whom lived on the east side of the river, and the latter on the west side; that three executions in favor of other creditors against Aaron Ashbrook, were placed in the hands of M. Moon on the twenty-first of June, 1839; that the deputy, Moon, levied the three executions in his hands on the property of A. Ash-

brook, and sold the same and paid the money to the plaintiffs in the executions that were in his hands; that, on the day of sale, he was shown the execution in favor of the relator and required to apply the money to that execution as the one which had come first to hand. The question upon these facts is, whether the sheriff is liable, upon his official bond, for the failure and refusal of his deputy, M. Moon, to pay the money made by him to the relator on his execution.

The following principles may be collected as settled by the various adjudications upon the statute of 29 Chas. II., c. 3, sec. 16, and on our own statute, 1 Stat. L. 636: 1. That between execution creditors there is no priority of lien other than that which is secured by a levy: 3 J. J. Marsh. 212;¹ *Harrison v. Wilson*, 2 Marsh. 551, 552; *Payne v. Drew*, 4 East, 545. 2. That when several executions are placed in the hands of different authorities, each competent to act, and commanded by the writ to do so, that the prior lien attaches in favor of the first levy, though made upon a junior execution, and one which came last to the hands of the officer: 4 East, *supra*; *Kilby v. Haggin*, 3 J. J. Marsh. 212, 213, and authorities *supra*. But 3. To secure perfect fairness and impartiality in the officer, between execution creditors, when several executions are placed in the hands of the same officer at different times, he is required to levy that first which first came to his hands, and to apply the money accordingly: *Tabb v. Harris*, 4 Bibb, 29 [7 Am. Dec. 732]; *Arberry v. Noland*, 2 J. J. Marsh. 422, and authorities *supra*.

The provision in the eighth section of our statute, *supra*, which directs the officer to pay the money upon the execution which first came to his hands, is applicable to the same officer only, and was intended to establish a rule, and inculcate its observance upon the officer, who had at the same time several executions in his hands in favor of different plaintiffs, by which he might be guided in the impartial discharge of his duty, in the levy as well as in the payment of the money made, and was not intended to secure to either a prior lien over the rest. If therefore, the office of sheriff is a unit, and the sheriff and his deputies constitute only a single officer or agent of the law, then it would follow from the foregoing principles, that the execution which first came to the hands of either, must be first levied and the money paid upon it; and a failure to levy or to pay, though the levy had been made upon an execution which came last to hand, would be an act of partiality which would amount to a

1. *Kilby v. Haggin*.

breach of duty that would render the principal liable for the amount. But though there may be many deputies, there is but one office of sheriff in a county, and that is filled by a single officer, to whom all process is directed as such, and who alone is looked to by the law, and required to do what is commanded by the precept to be done, and alone is rendered responsible for a breach or defalcation. He may have deputies and sub-agents, to assist in the performance of the duties enjoined on him, but those deputies are not distinct officers, nor are they looked to or treated by the law as such, or made responsible for official defalcations. Though their ministerial powers can not be limited or restricted by their principal, what they do is done in his name and by virtue of the command of the process directed to him and under the authority conferred on him. What the law inculcates on him to do, they should do, and when done, their acts have the same force and effect as if done by the principal.

When, therefore, an indorsement is made by a deputy of a time when an execution came to his hands, as required by the statute, it must be construed to have the same force and effect as if made by the principal, and if so, and the deputy's duty is precisely that which is inculcated upon his principal, as the officer of the law to whom the process is directed, it follows that as it would be unquestionably the duty of the principal to levy and pay the money upon the senior execution or the one which first came to hand, so it would be the duty of his deputies. Had the executions which were placed in the hands of the two deputies, Henry and Moon, come to the hands of their principal, and he had made the indorsement, it certainly would have been his duty to pay the money on the senior execution, and giving to each of their indorsements the same force and effect as if made by himself, and making his duty theirs, it became equally obligatory upon his deputy, Moon, to make the same application of the money. Nor can he complain of ignorance of the existence of a senior execution in the hands of the deputy, Henry, for he was apprised of it before the sale or payment of the money on the executions in his hands, and our statute expressly requires that "the execution which came first to hand shall be first satisfied." And though it has been settled that when executions come to the hands of distinct authorities, that a lien attaches in favor of that execution, though junior, which is first levied; yet it has also been determined in the construction of the statute of Charles II., *supra*, that if the same officer levy under an execution last delivered, he may apply that levy to the

execution which was first delivered, though no warrant issued thereon: *Jones v. Atherton*, 7 Taunt. 56; *Hutcheson v. Johnson*,¹ 1 T. R. 729. But he had sold the goods by virtue of the writ last delivered, the property of the goods was bound by the sale, and could not be seized under the first writ, but the party injured had his remedy against the officer: *Smallcomb v. Buckingham*, 1 Ld. Raym. 251; S. C., 1 Salk. 320; Com. R. 35; *Payne v. Drewe*, 4 East, 523.

If, therefore, it were the duty of the deputy, Moon, to do that which was the duty of his principal to do, had he, through mistake or ignorance of the prior execution in the hands of Henry, levied junior executions, when apprised of it, it was not only his privilege but his duty to sell under the senior and apply the money accordingly; and if even he had sold before notice of its existence, under our statute at least, he had the right, and it was his duty, at any time before he had parted with the money made, to apply it in satisfaction of the execution first delivered to the deputy, Henry. And this construction of the powers and duties of the principal and his deputies, is calculated to produce harmony and concert of action among them all, and to prevent secret arrangements and collusions between any one of them, and the more cunning and artful creditor, to the injury of other creditors.

It is therefore the opinion of the court that the judgment of the circuit court be affirmed with costs and damages.

LIEN OF EXECUTION RELATES TO WHAT TIME: See *Battle v. Bering*, 27 Am. Dec. 526; *Butler v. Maynard*, Id. 100, and cases cited in the notes to those decisions.

PRIORITY IN CASE OF SEVERAL EXECUTIONS AGAINST SAME DEBTOR: See *Green v. Johnson*, 11 Am. Dec. 763; *Palmer v. Clarke*, 21 Id. 340; *Johnson v. Ball*, 24 Id. 451; *Stebbins v. Walker*, 25 Id. 499; *Michie v. Planters' Bank*, 34 Id. 112, and cases cited in the notes thereto. The principal case is cited and distinguished on this point in *Rogers v. Dickey*, 1 Gilm. 640.

YOCUM v. POLLY.

[1 B. MONROE, 353.]

PROSECUTION IS TERMINATED BY ENTRY OF NOLLE PROSEQUI; the accused may then sue for a malicious prosecution.

DISCHARGE BY NOLLE PROSEQUI IS NOT PRIMA FACIE EVIDENCE OF MALICE or of want of probable cause to sustain an action for malicious prosecution.

1. *Hutcheson v. Johnson*.

MALICE AND WANT OF PROBABLE CAUSE MUST BOTH BE ALLEGED AND PROVED in an action for malicious prosecution, and though the former may be inferred from the latter, the latter can not be inferred from the former.

PARTY ACTING IN SUBORDINATION TO COMMONWEALTH'S ATTORNEY, in a prosecution instituted by the latter's direction, from information derived from others, is not liable for a malicious prosecution, though he is actuated by malice against the accused.

APPEAL from Washington circuit. The opinion states the case.

Owsley and O. A. Wickliffe, for the appellant.

Morehead and Reed, for the appellee.

By Court, MARSHALL, J. This was an action for a malicious prosecution brought by Polly against Yocum. The declaration avers that the defendant maliciously, etc., and without probable cause, procured a warrant to be issued for the arrest of the plaintiff on the charge of being present, aiding, and assisting in the murder of Preston Coulter, upon which he was arrested, imprisoned, and remained in prison until he was brought before the justices and put upon his trial, and the evidence being heard, the prosecution was dismissed by the commonwealth. The warrant and its indorsements show that several others were arrested with the plaintiff, on the same charge; that two of the others having been brought up for trial, and the evidence being heard, the justices discharged one of them, and the attorney for the commonwealth directed a *nolle prosequi* as to the other, and also directed a *nolle prosequi* as to the present plaintiff. We do not regard this as a substantial variance between the allegation and the proof. Nor do we doubt that the entry of a *nolle prosequi*, by the attorney for the commonwealth, was such a termination of the prosecution as authorized the bringing of this action, if the prosecution was in fact malicious and without probable cause, and if Yocum can be regarded as, in any proper sense, the prosecutor.

But a discharge from the prosecution by a *nolle prosequi* is not *prima facie* evidence of malice, or of want of probable cause, from which malice may always be implied: 2 Sel. N. P. 259; 2 Stark. Ev. 913. In the case of *Murray v. Long*, 1 Wend. 140, it is decided that proof of malice alone will not support the action; that malice may be implied from want of probable cause, but the want of probable cause can not be implied from the most express malice; and it is well settled that both must concur, to sustain the action. And as both must be averred by

the plaintiff, so he must adduce some proof tending to establish both, or at least tending to show that the prosecution was without probable cause, from which malice will be implied: 3 Stark. 911-915. Starkie says: "It is invariably necessary to give some evidence arising out of the circumstances of the prosecution, to show it was groundless, it is insufficient to prove a mere acquittal, or even to prove any neglect or omission on the part of the defendant to make good his charge," etc.

But on another branch of the case, the evidence strongly conduces to prove that any agency which the defendant may have had in the prosecution, so far as the plaintiff was concerned, was wholly in subordination to the commonwealth's prosecuting attorney for the district; that the defendant with other friends of the murdered man had determined to prosecute the actual homicide alone, unless, upon the evidence on his trial, it should appear that the plaintiff and others of his party who were present, ought to be presented; and that the plaintiff, etc., would not have been prosecuted, had not the commonwealth's attorney, upon information not derived from the defendant, directed the constable, who was acting in the business, to procure a warrant against the plaintiff and others. If this be so, we are well satisfied that whatever malice the defendant may have had against the plaintiff, and there is but little proof of any, he can not be liable for a prosecution thus instituted by the immediate direction of the public attorney, and in which he did nothing, but in subordination to that officer, and to effectuate his directions. If being, as he was, a justice of the peace, he had, on being informed by the constable of the attorney's directions, actually issued the warrant, this would not have implicated him, and much less, as we suppose, was he implicated by merely writing the body of the warrant, as requested, when neither the constable nor the other justice who was applied to was able to make it out without a form, and it makes no difference if he, in conjunction with the constable, applied to the other justice for the warrant which had been directed by the attorney. As to any subsequent agency which he may have had, nothing appears, except that he was used and consulted with by the prosecuting attorney as a near friend and relative of the deceased, not instigating the prosecution so far as the plaintiff was concerned, nor officiously interfering to carry out even the directions of the attorney. If these inferences of fact, which the evidence conduces to establish, are just, surely the opinion and directions of the attorney for the commonwealth, founded

on information not derived from the defendant, must have the effect of protecting him from liability for such an agency as is here supposed.

Upon considering the instruction given and those refused by the court, we are satisfied that the principles of law, applicable to the case, were not fairly placed before the jury, and especially that due effect was not given to the agency which the commonwealth's attorney may have had in instituting and conducting the prosecution without the instigation of the defendant; and on this ground, as well as because there was no proof of want of probable cause for the prosecution, we think a new trial should have been granted, and especially as the proof adduced by the defendant, on his motion for a new trial, and which he was not prepared to introduce on the trial, because, as he says, he was not in fact the prosecutor, and did not suppose he would be required to prove probable cause, do most strongly tend to the establishment of probable cause.

Wherefore, the judgment is reversed, and the cause remanded for a new trial.

PROBABLE CAUSE AND EVIDENCE OF: See *Griffe v. Sellars*, 31 Am. Dec. 422; *Stone v. Stevens*, 30 Id. 611, and notes.

MALICE AND WANT OF PROBABLE CAUSE BOTH NECESSARY to maintain action for malicious prosecution: *Turner v. Walker*, 22 Am. Dec. 329; *Leidig v. Ransom*, 29 Id. 354; *Stone v. Stevens*, 30 Id. 611, and cases cited in notes.

PRISONER DISCHARGED WITHOUT TRIAL MUST SHOW EXPRESS MALICE to sustain action: *Frooman v. Smith*, 12 Am. Dec. 265, and note.

ACTING UNDER ADVICE OF COUNSEL, evidence of, to rebut malice in a prosecution: See the note to *Frooman v. Smith*, 12 Am. Dec. 265. See also *Turner v. Walker*, 22 Id. 329, and note.

COLLETT v. JONES.

[2 B. MONROE, 19.]

MORTGAGE OF PROPERTY EXEMPT FROM EXECUTION does not render such property or the equity of redemption therein subject to execution by the mortgagor's creditors.

ERROR to the Wayne circuit in an action of replevin. The case appears from the opinion.

L. Hord, for the plaintiff.

By Court, MARSHALL, J. The thirty-sixth section of the general execution law of 1828 (Stat. Law. 653) subjects to execution the interest of a mortgagor in such property only as would have

been subject to execution if he had not mortgaged it; and therefore the property of a debtor, which, by the thirteenth section of the same statute, is declared to be exempt from execution, does not, in consequence of being mortgaged by him, become subject to execution against him, nor does his equity of redemption become subject. The voluntary subjection of such exempt property as a security for one debt by way of mortgage, is not a renunciation of the privilege of exemption, beyond the regular operation and effect of the mortgage itself.

The fact alleged in the plea, that the mare, for the taking and conversion of which this action of trespass was brought by Collett, had been mortgaged by him before the levy and sale under execution set forth in the plea, did not affect the plaintiff's right of action for taking the mare from his possession and converting her to the defendant's use, if she was his only work beast, and he was a *bona fide* housekeeper with a family, and did not claim the exemption of any tools as a mechanic. And as the replication to the plea stated these last-mentioned facts, it was clearly sufficient to maintain the plaintiff's action and to avoid the effect of the execution, levy, and sale set up in the plea, and the court erred in sustaining the demurrer to it and giving judgment thereon for the defendants. The declaration states that the mare was taken from the plaintiff's possession, and the mortgage was wholly immaterial.

The judgment is therefore reversed and the cause remanded, with directions to overrule the demurrer to the plaintiff's replication to the defendant's second plea, and for farther proceedings conformable to this opinion.

BRIZENDINE AND HAWKINS v. FRANKFORT BRIDGE COMPANY.

[2 B. MONROE, 32.]

JUDGMENT AGAINST ONE JOINT OWNER OF CHATTEL in an action brought by him for an injury thereto precludes him from maintaining with his co-owner a subsequent joint suit for the same injury; and such misjoinder may be taken advantage of by a plea in bar or in abatement, or by a motion for a nonsuit.

ERROR to the Franklin circuit. The opinion states the case. *Hewitt and Herndon*, for the plaintiffs.

Owsley, Morehead, and Reed, for the defendants.

By Court, ROBERTSON, C. J. Brizendine and Hawkins, as joint owners of a male slave and wagon and team, described in their declaration, sued the Frankfort bridge company, in trespass on the case, for an alleged injury to the said property, resulting from the falling of the bridge whilst the slave, wagon, and team were passing upon it. The corporation pleaded, in abatement, a former verdict and judgment rendered in bar, on the general issue, in a similar action previously brought against it by Brizendine alone, for the same injury to the same property. The circuit court having overruled a demurrer to that plea, and the plaintiffs failing to reply, judgment was rendered abating this action. And the only question we shall now consider, in revising that judgment, is whether the plea is good; for if the matter pleaded was sufficient to bar the joint action, as we think it was, then a preliminary question, as to the defendant's right to file a plea in abatement when this plea was first offered in court, need not be decided. The judgment, as exhibited, against Brizendine, in his separate suit is, in form and legal effect, a conclusive bar to another action by himself alone, for the same cause. The verdict is "for the defendant," and the judgment thereon, is that "the defendant go hence," etc. On the general issue, as tried in that case, Brizendine had a legal right to recover one half of the damage to the joint property; and even if the circuit judge erroneously instructed the jury otherwise, the only means of avoiding the bar was either to have suffered a nonsuit or procured a reversal of the judgment which, on the hypothesis suggested, was erroneously rendered in bar of the sole action.

Then, as the judgment against Brizendine alone still remains in full force, and he therefore has no cause of action, can he and Hawkins maintain this joint suit for the identical wrong as to which the former is thus, for the present, at least, barred by a valid and subsisting judgment against him? We think not. The misjoinder is fatal, and might have authorized a judgment in bar of any future joint action for the same cause; for such a judgment would not affect Hawkins' separate right of action in his own name alone for the injury sustained by him as one of the owners of the damaged property. As he was no party to the first suit the record thereof would be inadmissible as evidence against him, and in such a case, *ex delicto*, a separate action by him could not be either abated or barred by the non-joinder of Brizendine.

To a plea in abatement for non-joinder in such a several action, he might reply that Brizendine had been barred by a judgment in

a previous action brought by him alone, and such a replication would have been good; for neither a recovery of his aliquot portion of damages by one part owner of property in an action for a tort, nor a judgment against him alone, in such an action, can be availably pleaded to a separate action by another part owner: 7 T. R. 279;¹ 3 Kib. 244; 5 East, 407;² and *Baker v. Jewell*, 6 Mass. 460 [4 Am. Dec. 162]. But though Hawkins is not barred by the judgment against Brizendine, and the record of that judgment would not be admissible against him, yet as Brizendine is barred, he can not join in this action with Hawkins, and there is, therefore, in this case, a clear misjoinder, which was available to the defendant either by a plea in abatement, or a plea in bar, or a motion for a nonsuit. As, therefore, this action might have been barred for misjoinder, the parties have no right to complain of a judgment abating it merely.

Consequently the judgment of the circuit court is affirmed.

FUGATE v. CLARKSON.

[2 B. MONROE, 41.]

MORTGAGEE OF CHATTEL CAN NOT MAINTAIN REPLEVIN AGAINST SHERIFF seizing the same on *fi. fa.* against the mortgagor while in the latter's possession, and threatening to sell in disregard of the mortgagee's title. Some tortious act is necessary to constitute the sheriff a trespasser *ab initio* in such a case, and a mere threat to sell the property absolutely is not sufficient.

ERROR to Pendleton circuit, in an action of replevin. The case appears from the opinion.

Morehead and Reed, for the plaintiff.

Trimble, for the defendant.

By Court, ROBERTSON, C. J. In this case the only question is that which was stated, but left undecided, in *McIsaacs v. Hobbs*, 8 Dana, 271, and that is, whether a mortgagee, entitled to the possession of movable property remaining with his mortgagor, may maintain an action of replevin therefor against a sheriff who, though apprised of the mortgage, had taken it under a *fi. fa.* as the absolute property of the mortgagor, and had avowed his determination to sell it without regard to the mortgagee's claim of title. And this point being now, for the first time, fairly pre-

1. *Sedgworth v. Overend*.

2. *Blossam v. Hubbard*.

sented for judicial decision, we are of the opinion that the facts just stated are not sufficient for maintaining the action.

Although the mortgagor's possession, in this case, might be deemed that of the mortgagee, yet the equity of redemption being nevertheless liable to sale under the execution, the sheriff had a legal right to take the property into his possession and hold it until after a sale according to law; and, until after an illegal sale, or some other tortious act making the officer a trespasser *ab initio*, the mortgagee can have no right to divest him of his possession. His expressed determination to disregard the mortgage, can not be judicially recognized as an illegal act or sufficient proof that he had violated the law in taking the property, or would, in fact, violate it in the sale. Notwithstanding such declaration, he might sell subject to the mortgage, as he would still have the indisputable right to do, and ought to do, if the mortgagee's title be good against the execution creditor. In such a case, if the mortgagee desire the possession of the property, instead of interposing to prevent a sale by the officer, who might sell legally and without any wrong to him, he should wait until the sale, when, if the equity of redemption only shall have been sold, he will be entitled to restitution of possession from the sheriff; and if the absolute title shall have been illegally sold, he may replevy the property either as against the sheriff, before delivery to the purchaser, or as against the latter if he shall have taken it wrongfully into his possession. Any other doctrine would seem to us to be not only unnecessary for the security of the mortgagee, but subversive of justice and inconsistent with the policy and analogies of the law.

Wherefore, as the decision of the circuit court is inconsistent with this opinion, the judgment must be reversed and the cause remanded, with instruction to render judgment for the sheriff on the special verdict.

MORTGAGEE'S RIGHT OF ACTION AGAINST OFFICER seizing the mortgaged property under a *f. fa.* against the mortgagor: See *Sanders v. Vance*, 18 Am. Dec. 167. The principal case is cited as an authority on this point, and distinguished in *Tannahill v. Tuttle*, 3 Mich. 118; *Nelson v. Wheelock*, 46 Ill. 27.

MORRIS v. EVANS.

[2 B. MONROE, 84.]

JOINT JUDGMENT DEBTOR PAYING WHOLE DEBT under an express agreement with the creditor that such payment is not to be deemed a satisfaction of the judgment, but that such debtor shall have the right to enforce the same against his co-debtors, is entitled to be subrogated to the creditor's rights for the purpose of obtaining contribution from such co-debtors, and where such debtor has procured execution to be issued upon the judgment, which the creditor moves to quash, the court will, upon proof of the facts, overrule such motion.

ERROR to Estill circuit. Motion to quash execution. The point to be determined appears from the opinion.

Turner, for the plaintiff.

Hanson, for the defendant.

By Court, ROBERTSON, C. J. The only question we shall notice in this case is, whether after one of several principal obligors in a judgment shall, without coercion, have advanced the amount thereof to the creditor, upon an express agreement between them that the advance shall not be considered a payment in satisfaction of the judgment, but that the party who made it shall have a right to issue execution thereon against himself and co-defendants, and control the same, he is entitled to such an equitable subrogation as to authorize a court of law, upon proof of these facts, to overrule a motion by the judgment creditor, to quash an execution issued (without his consent at the time of emanation) at the instance of the party claiming substitution?

Had the party making the advance been shown to be a surety merely, although a simple payment by him without proof of any special agreement, would necessarily operate as an extinguishment, yet he would have had a right upon making a voluntary advance of the money, to stipulate expressly with the creditor for substitution, and then the payment should have been considered as merely the consideration of that equitable transfer, and not as a satisfaction of the judgment, which would frustrate the object of the parties. And in such a case a court of law would not permit the judgment creditor to control an execution on the judgment, issued at the instance and for the benefit of the surety. This is according to a principle of the civil law and of universal equity, which has been more than once recognized by this court. Does not the reason of the same equitable doctrine equally apply, to some extent, to a party who is bound as a co-principal? We can not perceive why it does not. If he be legally bound in the first

instance, to pay the whole debt, so is the surety. The only difference between them is that a payment by one entitles him to restitution of the whole, and a payment by the other entitles him to a reimbursement of only a part of what he paid. This only difference should not, in our judgment, essentially affect the question we are considering in this case. Its only effect should be to prevent the substituted party, if he be one of several principal obligors, from enforcing the execution against his associates for his own aliquot portion of the joint debt. To that extent he is, in equity, as well as in technical law, principal as between himself and his co-obligors; but beyond it he is, as between themselves in equity, only a surety.

It, therefore, seems to us that the circuit judge did not err in this case, in overruling the judgment creditor's motion to quash the execution, and consequently, the judgment must be affirmed.

SURETY'S RIGHT TO BE SUBROGATED to rights of creditor where he has paid the debt: See *McClung v. Beirne*, 34 Am. Dec. 739; *Eddy v. Traver*, 31 Id. 261; *Bank of Montpelier v. Dixon*, 24 Id. 640, and notes

BISHOPS v. McNARY.

[2 B. MORROW, 132.]

NOTICE BY ONE CONTRACTING PARTY OF TIME AND PLACE when he will proceed to perform the contract need not be in writing.

NOTICE TO ONE OF TWO JOINT CONTRACTING PARTIES of the time and place when the other party will proceed to perform the contract, is sufficient.

INSTRUCTION TO FIND AS IN CASE OF NONSUIT is in the nature of a demurrer to evidence, which admits the evidence, concedes its truth, and is predicated upon it.

INCOMPETENCY OF WITNESS FROM INTEREST IS NOT GROUND OF INSTRUCTION to find as in case of nonsuit, but the objection should be taken by a distinct motion to exclude the evidence.

APPEAL from Bath circuit in an action of covenant brought by the appellants against the appellees on a certain contract, whereby the appellants sold and covenanted to deliver to the appellees between the fifteenth and twentieth of October, 1837, six hundred fat hogs of a specified description, to be delivered in such pens as the vendors should select, within ten miles of Elizaville, the vendees covenanting to pay therefor on delivery a certain sum per hundred-weight. Other facts, so far as material, are stated in the opinion.

Hord and Apperson, for the appellants.

Owsley, for the appellees.

By Court, EWING, J. This case was formerly before this court, on the appeal of the now appellees. The history of the case and principles settled by the court, on the facts then exhibited, will be found reported in 8 Dana, 150.¹ Upon the return of the cause to the circuit court, the plaintiffs amended their declaration, adding other counts, in one of which a general averment was made of reasonable and legal notice to defendants, of the time and place of weighing and delivering the hogs, and in another an averment that they had caused the defendant, Walker, to be duly and properly notified on the second of October, 1837, that the plaintiffs would commence weighing and delivering the said hogs at Amus Hart's (describing the place), on Monday, the sixteenth day of October, 1837, and after weighing and delivering so many of the said hogs as should be weighed at the said Hart's, that the plaintiffs would forthwith go from thence to Abner Hord's, and weigh and deliver the residue of the said hogs in the covenant mentioned, and that Hart's and Hord's were both within ten miles of Elizaville; and that the time for weighing and delivering all of the said hogs at Hart's and Hord's, commencing on the sixteenth of October, 1837, was amply sufficient, before the latest convenient hour of the day, on the twentieth of the same month. The defendants filed two pleas, in one of which they deny notice to Walker, on the second of October, as averred in the declaration, and in the other they deny that the plaintiffs had six hundred hogs at two pens within ten miles of Elizaville, or that they weighed or set them apart, of the description mentioned in the covenant, or that the defendants refused to receive them.

After the plaintiffs' counsel had adduced all their evidence, the court, on the motion of the counsel for the defendants, instructed the jury as in case of a nonsuit, and the plaintiffs have appealed to this court. The evidence is objected to by the appellees, as insufficient to support the action, on the following grounds: 1. That the notice to Walker was in parol, and not in writing; 2. That it was given only to one of the joint contractors; 3. That it was proven by Wallingford, who was interested on the side of the plaintiffs.

We think that neither of these objections is sustainable.

1. We know of no rule which requires that notice of the time

1. *McNary v. Bishop*.

and place when one of the contracting parties will proceed to perform the contract on his part, shall be in writing. All that can be required is that the other contracting party shall be apprised, in due time, and with such reasonable certainty of the time and place of performance, as will enable him, if he, in good faith, intends a compliance with the terms of his contract, to attend at the time and place designated. And this may be effected by a parol communication as well as by writing. 2. We also think that notice to one of two joint contracting parties, is sufficient. But if this were doubted, the jury may have inferred from the letter written by McNary to one of the plaintiffs, that he had been apprised by Walker, his co-contractor, or some other, of the times and places at which the plaintiffs intended to go on to fulfill their contract. 3. If it were conceded that Wallingford was interested on the side of the plaintiffs, to the extent of the costs, from the payment of which he had not been released by the plaintiffs, and was, therefore, an incompetent witness; yet the instruction should not have been given on that ground.

An instruction to find as in case of a nonsuit, is in the nature of a demurrer to the evidence which admits it, concedes its truth, and is predicated upon it; and it matters not whether it be given by an interested or disinterested witness. To allow the motion to prevail, by a virtual exclusion or rejection of the evidence by the judge on the ground of the interest of the witness, would be calculated, in practice, to take the plaintiffs by surprise, and do him manifest injustice. If his evidence were rejected by a distinct motion, made to that end, the objection to the witness might be removed by release, or his evidence supplied by other witnesses, which he would be deprived of the privilege of offering, if the motion to instruct as in case of a nonsuit, were to prevail on the ground contended for.

Judgment reversed and cause remanded, that a new trial may be granted.

CITY OF LOUISVILLE v. HYATT.

[2 B. MONROE, 177.]

STATUTE MUST BE CLEARLY UNCONSTITUTIONAL before the court will pronounce it invalid.

CHARTER AUTHORIZING MAJORITY OF LOT OWNERS ON A SQUARE to require the grading and improvement of streets bounding their square, at the expense of lot owners on such square, by petition to the city council, provided the council unanimously direct such improvement to be made, is constitutional.

ORDINANCE OF CITY COUNCIL ALLEGED TO HAVE BEEN "DULY MADE," where such allegation is not denied, will be presumed to have been passed by a unanimous vote as required by the city charter.

ORDINANCE OF CITY COUNCIL MAY BE IMPEACHED by showing that it was not passed in the manner required by the charter, and the corporation books are not conclusive on that point.

COST OF GRADING STREET SHOULD BE DISTRIBUTED among the lot owners on a square, by imposing upon each his aliquot portion of the whole cost, estimated according to the extent of his lot on the street.

MUNICIPAL COUNCIL ARE FINAL JUDGES OF UTILITY of street improvements which they are authorized to make, and the remedy of a lot owner, if any, is by action, and not by resisting the order for the improvement.

ERROR to the Louisville chancery court. The case appears from the opinion.

Owsley, for the plaintiff.

Guthrie, for the defendant.

Pirtle, for the owners of the lots.

By Court, ROBERTSON, C. J. The ninth section of the charter of the city of Louisville, 1828, re-enacted and in force yet, provides, "that the mayor and council shall have power and authority to cause and procure all the streets and alleys, now established, or hereafter to be established, to be paved and turnpiked at the cost and expense of owners of lots fronting such streets or alleys, and a petition of the owners of a majority of lots or parts of lots fronting on any square, shall be sufficient to authorize a contract for paving or turnpiking the streets or alleys in such square; provided, however, the mayor and council, by their unanimous consent in council, may cause any street or alley, in any square in said city, to be paved, etc., at the cost, etc., of the owners of lots, etc., fronting such streets or alleys, without any petition, and when such paving, etc., shall be completed, they shall apportion the costs, etc., equally on the lot-holders, and a lien is hereby created on the lots, etc., for the same." The tenth section of the charter makes the same provisions in reference to "grading, filling up, and leveling streets;" and an act of 1836 authorizes a suit in chancery for enforcing the statutory lien.

It will be seen, on comparison, that the provisions of the ninth section of the charter of Louisville are substantially the same as those of the eleventh section of the charter of Lexington, as quoted and expounded by this court in the case of *The City of Lexington v. McQuillan's Heirs*, 9 Dana, 514; and therefore, the same authority being given to the mayor and council of each of

those cities by the ninth section of the charter of the one city and the eleventh section of the charter of the other city, so far as it may be constitutional, when exercised by Lexington, it must be equally so when exercised in the like manner by Louisville. And although we frankly admit that we have never been perfectly satisfied as to the constitutional validity of the power involved and considered in the case of *The City of Lexington v. McQuillan's Heirs*, *supra*, yet still feeling, as we did when we decided that case, that we are not able to perceive clearly or to prove satisfactorily that the legislature, in enacting the eleventh section of the charter of Lexington, transcended the boundaries of legislative power prescribed by the supreme organic law of the state, it does seem to us that we should be justly chargeable with wandering from the appropriate sphere of the judiciary department, were we, by a subtle elaboration of abstract principles and metaphysical doubts and difficulties, to endeavor to show that such a power may be questionable, and on such unstable and unjudicial ground, to defy and overrule the public will as clearly announced by the legislative organ. Whenever this court shall be well convinced that a legislative act is unconstitutional, it should not hesitate to pronounce it so, and therefore, to disregard it as void. But the policy and justice of legislation belong, not to judicial but to legislative discretion. And to merely doubt legislative power is not enough to justify judicial resistance. We do not feel inclined, therefore, to retract or essentially qualify the opinion in the case of *The City of Lexington v. McQuillan's Heirs*, neither subsequent reflection nor argument having, in any degree, shaken our judgments as to the correctness of it.

In that opinion we suggested, that so far as improvement of streets may be concerned, the charter had virtually subdivided the city into subordinate *quasi* municipalities or communities, each consisting of the lot-holders in a defined square—and is not this substantially true? Does not the charter of each of the cities of Lexington and Louisville authorize “the owners of a majority of lots or parts of lots fronting on any square,” to require the improvement of any street bounding their square, at the expense of all the owners of ground on their portion of that street, and also authorize the mayor and council, by unanimous vote in council, to make the like improvement of fractions of streets by squares, at the like distributive cost of the local proprietors? And in this anomalous provision, in one aspect of it so democratic and in the other so carefully guarded, against

oppression or gross injustice, we have been unable to perceive any sufficient ground for deciding that the fundamental law of the state has been violated; and we presume that, in the prudent exercise of this police authority, unreasonable inequality of burden will rarely, if ever, be imposed, considering the past and prospective improvement of the several squares in the same prescribed mode. But in this case, on a bill filed by a contractor against several owners of ground on a street fronting their square in Louisville, for enforcing payment of the sums assessed against them respectively, for improving that portion of the street without their consent, but under an ordinance of the mayor and council, the chancellor decided that the provision in the charter which purports to authorize the imposition of such a local burden is unconstitutional, and, therefore, he dismissed the bill as against the proprietors and rendered a decree in the contractor's favor against the corporation itself, which was also a party defendant.

And in that opinion, the learned chancellor, in criticising, as he was pleased to do, the suggestion as to the subdivision, as just defined, of the aggregate municipality, and characterizing such a corporation as Briarian, thought fit to illustrate his conviction of its absurdity, in the following manner: "But as the giant Briarius, of fifty heads, was buried under Mount Ætna for his crimes in assisting the giants against the gods, so this gigantic corporation of more than one hundred and fifty heads (son of Somnus and Luna) ought to be buried under poppies in a cave, where the sun never penetrates, for warring against the constitution and common sense." We could not wander so far from the judicial path as to reply to the venerable chancellor's misapplied apologue, from the most fanciful of Grecian poets of old; we have thought proper to quote it for publication in our legal reports, only as an illustrative episode to a constitutional argument by a patriarchal jurist. But, not acknowledging mythology to be law, nor Hesiod to be authoritative on a question of political power in Kentucky, we must still adhere to the opinion in *The City of Lexington v. McQuillan's Heirs*, Somnus and Luna, and the poppies, and even cave, in *terrorem* notwithstanding.

But the order for grading the street in this case does not expressly show that it was adopted "by the unanimous consent of the mayor and councilmen" in council, and on this ground also, the chancellor has decided that no legal authority for the graduation has been shown. There is neither any direct allegation

nor extraneous proof of such unanimity, and without an unanimous vote of all the councilmen and the mayor in council, the order was illegal and void. This is one of the chief conservative principles of the charter on this important subject, and should therefore be strictly enforced. The bill, however, alleges that the order was "duly made," the copy of it as exhibited imports that it was made in council "by the mayor and council," and the answers, though they deny the constitutional validity of it on other grounds, do not suggest any doubt as to a want of the required unanimity. Upon such a bill and such answers, we are of the opinion that the order, as exhibited, should, *prima facie*, be presumed to have been made in the mode prescribed by the charter. As functionaries, acting openly for the welfare of the local public and under official responsibility, the acts of the mayor and council should, in some degree, be accredited as regular and legal: usurpation without an apparent motive, should not be presumed; unanimity was indispensable to the legal authority to make the order—the order was made "by the mayor and council," and, therefore, upon the pleadings in the case, we feel authorized to presume that the order was made by the unanimous vote of the mayor and councilmen "in council." Angell on Corp. 290; *Commonwealth v. Woelper*, 3 Serg. & R. 29 [8 Am. Dec. 628]. The order, however, as entered on the municipal journal, is not conclusive. It may be impeached and shown, by extraneous proof, to be void for want of the unanimity required by the charter; for, though the entries in the corporation books may be evidence against the incorporators, it is not conclusive: Angell, 289-291, and the *Case of St. Mary's Church*, 7 Serg. & R. 530.

Nor do we concur with the chancellor in the opinion that there was no sufficient proof that the street was legally established, or was within the jurisdiction of the city authorities; an order for opening it had been made upon notice to Cosby, who held the only beneficial interest in the ground, and it has since been recognized as a street and used as such by the holders of the property on each border of it. All this is, we think, sufficient for this case. The necessary consequence of the foregoing view of the case is, that, as the local law authorized a bill in chancery by the contractor against all recusant lot-holders for their distributive portions of the price of his work on the street opposite their squares, there is error in the decree dismissing the bill against them in this case, and in rendering a decree against the corporation—the contract binding the mayor and council

only to make an assessment and give orders on the proprietors, as they had done before the bill was filed. The contract was for the cutting and grading of the street "preparatory to paving," and stipulated for the payment of twenty-five cents "per square yard," for cutting, grading, and removing the dirt. That portion of the street assessed in this case, was four hundred and ninety by ninety, and the width of an intersecting street in addition thereto. The excavation was from five to seven feet, and the city engineer assessed the total contract price therefor at three thousand and twenty-four dollars and seventy-five cents, the whole of which, excepting so much only as was allowed for the intersecting street, was distributed *pro rata*, among the owners of ground on each border of the street.

But the chancellor, construing the contract as entitling the undertaker to only twenty-five cents "per square yard," according to superficial mensuration, reduced the assessment to one thousand two hundred dollars, that sum being twenty-five cents a yard for the superficial contents of four hundred and ninety by ninety feet. A square yard, when applied to a surface, means, of course, superficial measure, but when applied to a solid, it might and generally would import solid measure or a yard every way, according to the subject of mensuration; and, therefore, as an excavation of unascertained extent in depth was the subject-matter of the contract in this case, the "square yard," though abstractly it would mean a superficial yard, may have been, and probably was, intended to mean, synonymously with cubic yard, the square yard or yard every way of the solid contents of the excavated ground. And this interpretation would be fortified by the fact that the mayor and council and the city engineer seem to have so understood the contract.

But, as this subject is one, concerning which there may be some latent doubt, and as, moreover, it was not directly litigated in the court below, and the cause will be remanded, we will not now conclude any farther and extraneous proof. We here deem it but prudent to suggest that a gross abuse of a just and provident discretion, either in agreeing to allow a stranger, as undertaker, an exorbitant compensation, or in refusing to permit the local proprietors to do each his distributive portion of the required work, if they or any of them propose to do so, and offer a satisfactory guaranty thereof, might furnish some ground to a court of equity for resisting the stranger's prayer for enforcing the statutory lien against the proprietors, or for reducing the amount and remitting the complainant to the corpora-

tion for what he may lose thereby in his suit against the proprietors. We will only add that, in distributing the burden of the entire cost of the excavation, each lot-holder on the squares divided by the graded street should be required to pay, not one half the cost of the grade opposite to his ground, but his aliquot portion of the whole cost, estimated according to the relative extent of his lot on the street; and also, that although the mayor and council are the final judges of the utility of the prescribed improvement, yet, if any of the proprietors have been damnified, his remedy, if any, is by action, and not by resisting the enforcement of the order for graduation.

Decree reversed and cause remanded for such farther proceedings and decree as may be proper, according to the principles of this opinion.

STATUTE MUST BE CLEARLY UNCONSTITUTIONAL before the court will declare it void: *Tate v. Bell*, 26 Am. Dec. 221; *Hoke v. Henderson*, 25 Id. 677; *Lane v. Dorman*, ante, 543. To the same effect is *People v. Collins*, 3 Mich. 404, citing the principal case.

AUTHORITY OF MUNICIPAL CORPORATION TO GRADE OR REGRADE STREETS: See *Keasy v. City of Louisville*, 29 Am. Dec. 395, and note.

MOREHEAD v. JONES.

[2 B. MONROE, 210.]

OTHER PARTS OF PAMPHLET ALLEGED TO BE LIBELOUS in certain paragraphs may be read in evidence by the defendant to explain the paragraphs upon which the action is founded, to show the motive and intent of the publication and mitigate the damages.

EVIDENCE IN MITIGATION OF DAMAGES is admissible notwithstanding a plea of justification.

ERROR to the Bracken circuit. The opinion states the case.

Payne and Waller, for the plaintiff.

Morehead and Reed, for the defendant.

By Court, EWING, J. This is an action for a libel brought by Morehead against Jones, in which a verdict of one cent in damages was found for the plaintiff, and judgment rendered thereon, and he has brought the case to this court. The action was for certain paragraphs contained in a pamphlet alleged to have been composed, printed, and published by the defendant, of and concerning the plaintiff, charging him with perjury and an attempt at bribery, and subornation of perjury. The defendant pleaded justification. On the trial the plaintiff read to

the jury, from the printed pamphlet, such of the paragraphs as were set forth and charged in his declaration as libelous. The defendant was permitted to read to the jury, from the same pamphlet, certain paragraphs immediately preceding and succeeding those charged in the declaration to be libelous, and read by the plaintiff to the jury as such, showing that the pamphlet was composed and published in answer to a letter previously written and published by the plaintiff, in which it is said he ruthlessly assailed the character of the defendant, and also referring to his informant as to the charge of perjury, as a man of character and truth, standing upon terms of intimacy with the plaintiff, and not likely to make a statement unfounded in truth, so injurious to his reputation. To the reading of these paragraphs by the defendant the counsel for the plaintiff objected, which objection was overruled by the court, and the only question presented in the record for the consideration of this court is, was the opinion of the circuit court correct in permitting those parts of the pamphlet to be read as evidence to the jury. We can perceive no good reason for excluding the evidence read; it was part of the same pamphlet which contained the libelous matter, and on the same subject, and was properly received as explanatory of the subject-matter, occasion, motive, and intent of the publication. In the case of *Hotchkiss v. Lothrop*, 1 Johns. 286, the court permitted a previous publication against a third person to which the defendant's publication was an answer, to be read to the jury, in mitigation of damages. And with the same object, in the case of *Williams, alias A. Perkin, v. Foulder*, tried before Lord Kenyon in 1797, his lordship permitted the counsel for defendant to read passages from various scurrilous publications previously made by the plaintiff against reputable characters of the kingdom.

Without sanctioning the doctrine to the extent that it was carried in those two opinions, and especially the latter, we can not doubt that it was proper to allow passages to be read from the same pamphlet, explanatory of the subject, motive, and inducement to the publication. The defendant should be tried by what he has published and the whole of what he has published in the same pamphlet, on the same subject, and not by such passages as the plaintiff may select and dislocate from their context, and make the basis of his action. As the party whose confessions are relied on and proven, has a right to the proof of his whole confession, or in slander, after the plaintiff has proved a part of the words spoken by the defendant, the latter

may extract from the witness all that was said at the same time on the same subject. So it would seem that he who is sued for a libel should not be confined to and rendered responsible for those passages only which the plaintiff may select, but should be indulged in reading to the jury the whole he has written and published at the same time, and on the same subject, especially when the whole may be necessary to a full understanding of the subject, degree of malice, origin, design, and motive of the publication. Though malice is implied from language, verbal or written, which imports a charge of a criminal nature, yet there are degrees of malice which may lessen or enhance the guilt and should lessen or enhance the damages; and to enable the jury to determine the degree of malice, all that was published on the same subject at the time should be heard. The law regards the passions of men; and though they will not be allowed to exercise or justify a slander or libel, they may palliate the guilt, and should be permitted to mitigate the damages. The parts read were, therefore, properly permitted to go before the jury, unless, as is contended by the plaintiff's counsel, it should be deemed improper to allow a defendant, who has pleaded justification, to introduce as evidence any palliatory circumstances other than the bad character of the plaintiff, in mitigation of damages.

We can perceive no good reason for the distinction taken by the plaintiff's counsel. The defendant is allowed, by our statute, to plead as many pleas as he may deem necessary for his defense. If he pleads justification, he does so in the exercise of a right which the law guarantees to him, and though he should fail to sustain the issue, on this plea, he is no more censurable than if he should plead not guilty, or any other plea, the issue on which should be found against him. In either case, he may be innocently mistaken in the proof; or it may turn out differently or fall short of that which he had a right to expect, from the ignorance, misrecollection, or corruption of witnesses. Failing in this issue on the plea of justification, as well as a failure to support the issue on any other plea, leaves open the question of damages, and should no more, in the one case than in the other, preclude an inquiry into those palliatory circumstances, which bear upon the question of damages. Indeed the question of damages is a distinct question from the question which arises on the issues submitted to the jury, and though they are submitted to the same jury, the former can never arise but upon a determination of the latter question in favor of the

plaintiff. If each were submitted to a different jury, it would more readily appear that the character of the issue submitted to and determined by one jury, should have no effect upon the question submitted to the other. Though they are both tried by the same jury, they are distinct questions, and the one should not be permitted to have any effect upon the other. The defendant may introduce evidence tending to prove his justification, but not knowing how the jury may find, may introduce palliatory circumstances which bear upon the question of damages, which the jury are required to assess in the event of their finding the issue against him. And this may be the case on the trial of any other issue. It is the province of the court to instruct the jury how to apply the evidence, and under the instruction of the court there is no danger of their misapplying it; and if there were, it forms no good reason for excluding that which bears upon the damages, as that question, as well as the issue, is to be decided by the jury, any evidence which may enlighten their judgment on either question, ought to be heard.

We are aware that it had been decided in Massachusetts, in the case of *Alderman v. French*, 1 Pick. 18 [11 Am. Dec. 114], and the same principle sanctioned in the case of *Bodwell v. Swan*, 3 Id. 377, that when a defendant has staked his defense on a plea of justification, that he will not be permitted to prove palliatory circumstances in mitigation of damages; but we think the doctrine sanctioned in those decisions is neither sustained by principle nor authority. Nor has there been a uniformity in the decisions upon this question in that state; for in the case of *Larned v. Buffinton*, 3 Mass. 553 [3 Am. Dec. 185], Parsons, C. J., says, "that when, through the fault of the plaintiff, the defendant, as well at the time of speaking the words as when he pleaded his justification, had good cause to believe they were true, it appears reasonable that the jury should take into consideration this misconduct of the plaintiff to mitigate damages."

Upon the whole, we think that the passages of the pamphlet read by the defendant's counsel, were properly admitted, and the judgment is affirmed with costs.

MITIGATION OF DAMAGES IN LIBEL: See *Commonwealth v. Morris*, 5 Am. Dec. 515; *Maynard v. Beardsley*, 22 Id. 595. As to the admissibility of evidence in mitigation of damages where justification is pleaded, the principal case is cited in 15 Ill. 426.

EVIDENCE IN MITIGATION OF DAMAGES FOR SLANDER: See *Sanders v. Johnson*, *ante*, 564, and cases cited in the note thereto.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

GAIIENNIÉ v. AKIN'S EXECUTOR.

[17 LOUISIANA, 42.]

SERVICE OF A CITATION UPON ONE PARTNER, during the existence of the partnership, is a service upon all.

SERVICE OF CITATION AFTER DISSOLUTION of a partnership, does not bind the partners who are not served personally, nor will the fact that the partner served had been given a general power to settle the partnership accounts, render the service upon him valid as to the others.

JUDGMENT AGAINST A PARTNER WHO WAS NOT PERSONALLY SERVED with process in an action brought after dissolution of the partnership, is void.

APPEAL. The opinion states the facts.

C. Janin, for the appellant.

Canon, *contra*.

By Court, MORPHY, J. This action is brought to annul a judgment obtained by one Oliver Akin against plaintiff, as a member of the firm of Gaiennié & Deneufbourg, on the ground that no citation had been served on him, the plaintiff; that the partnership of which he had been a member had been dissolved by mutual consent several months before the institution of the suit; that public notice of such dissolution had been given in the public papers, and that the plaintiff in that suit had had direct notice thereof by the separate answer which Deneufbourg had filed long previous to the rendition of the judgment sought to be avoided. Plaintiff sued out an injunction to arrest the execution of a *feri facias* against him under such judgment. On the very day the present suit was brought, Deneufbourg

having satisfied the judge below that he had paid up the amount of said judgment, and was by such payment, subrogated to the rights of Akin, under it, he was allowed to take out against the plaintiff a *capias ad satisfaciendum* for one half of the judgment and costs; but this writ was also enjoined on the grounds already stated. The defense set up was that the citation served upon Deneufbourg, one of the partners of the old firm, was good or binding on plaintiff, because at the dissolution of the partnership, Deneufbourg had been charged with the liquidation of the accounts. The court below dissolved the injunctions previously granted and decreed damages against the plaintiff and his surety on the injunction bond.

We think the court erred; it is true that during the existence of a commercial partnership, service of citation on one of the members is good against all of them, but after its dissolution, every member intended to be made a party to a suit must be served with a separate citation. The general power given to one partner to settle and liquidate the accounts of the partnership does not appear to us to confer on him greater rights than each member of the firm after its dissolution could have possessed for the purpose of liquidation, had no liquidator been appointed. It relates to the payment of acknowledged debts and the collection of all sums due to the firm, but does not enable the liquidator to stand in judgment for the other partners, unless a special power to that effect be granted. Our code requires express and special power to be given whenever the things to be done are not merely acts of administration: La. Code, act 2966; 8 La. 568;¹ 13 Id. 484.² But even could the general power to settle all accounts be considered as sufficient to enable Deneufbourg to defend a suit brought against his former partner, the record shows that he was not sued as liquidator of the partnership; and that he did not appear in the suit in that capacity, he appeared and filed for himself a separate answer tending to throw the burden of the whole debt on his late partner, Gaiennié, on the ground that the draft sued on had never been accepted for the good of the firm; but had been accepted by Gaiennié for his own private use and benefit without his (Deneufbourg's) knowledge and in fraud of his rights. After such an answer, Gaiennié could not be considered as represented in the suit or as legally cited. No judgment by default could be taken against him, without a separate citation being first served upon him according to law; this not having been done, all the pro-

1. *Peters v. Gardere*.

2. *Cutler v. Ockron*.

ceedings in the suit were as to him absolutely null and void: Code of Pr., arts. 206, 606.

It is therefore ordered and adjudged, that the judgment of the district court be reversed; that the injunction sued out by plaintiff be made perpetual, and that the appellee pay costs in both courts.

UNAUTHORIZED JUDGMENT AGAINST A FIRM will be binding upon the partner who assents to it, though inoperative against the other: *St. John v. Holmes*, 32 Am. Dec. 603, the note to which discusses this subject.

POWER OF COPARTNER AFTER DISSOLUTION to bind the others by his acts. The different cases in this series upon this subject will be found in the note to *Cady v. Shepherd*, 22 Am. Dec. 386.

LANDRY v. BAUGNON.

[17 LOUISIANA, 82.]

NO AMENDMENT OF PLEADINGS IS ALLOWED after the rendition of judgment.

NEWLY DISCOVERED EVIDENCE CONSTITUTES NO GROUND FOR A NEW TRIAL unless it would be admissible under the pleadings as they existed prior to the rendition of the judgment, without further amendment.

NEW TRIAL WILL NOT BE GRANTED AFTER A JUDGMENT by default in an action to recover the amount of a debt, although it is shown that proof of payment could be made by newly discovered evidence, if it appears that the evidence would not be admissible without an answer were first filed in the action.

EVIDENCE OF PAYMENT of a debt is not admissible unless payment is specially pleaded.

APPEAL. Action to recover three hundred dollars and interest, the balance of the price of a tract of land sold by plaintiff to defendant. Suit was commenced on September 14, 1840. On the fifth of October following a judgment by default was entered. On the eighth of October defendant appeared and moved for a new trial, upon the ground that evidence had been discovered since the judgment was rendered, by which it could be shown that the debt sued for had been paid. Motion overruled. Defendant appealed.

Labauve, for the plaintiff.

Burke, *contra*.

By Court, SIMON, J. Defendant is appellant from a judgment by default rendered and made final against him. Before taking his appeal, he made a motion for a new trial, which was overruled by the lower court; and as the record comes up without any

statement of facts, and without the proper certificate of the clerk that it contains all the evidence adduced in the case, the only question submitted to our consideration is, whether the judge erred in overruling the motion for a new trial.

The affidavit of the defendant, in support of his motion, is in these words: "That it is true, as alleged in the above statement of grounds for a new trial, that the plaintiff's demand had been, long anterior to the institution of this suit, paid; written evidence of which payment the deponent has lost or mislaid, but that he has discovered, since the trial of the cause, R. B., a witness, who will prove the existence, execution, and contents of said lost or mislaid written evidence of payment, testimony which he could not, with due diligence, have obtained before." Now, in supposing this affidavit to be sufficient, the facts said to have been discovered since the trial of the cause, would be applicable only to a defense which was not set up, and it is perfectly clear that whenever a new trial is applied for on account of new evidence discovered since the cause was tried, the party must show not only that he has used every effort and diligence in his power to procure it, but also that it is admissible and material under the pleadings: 7 La. 82;¹ 10 Id. 155.² In this case, however, no issue was joined by the defendant, as the judgment is one by default; but we think that this can not better his situation, as by an order to authorize the introduction of the newly discovered evidence, for the purpose of proving the extinguishment of the debt by payment, such payment must be specially pleaded: 6 Id. 457;³ and as he would not be allowed to introduce any such evidence without amending the pleadings and filing an answer, which can not be permitted after judgment: 3 Id. 487.⁴ If the defendant's allegation, that he has paid the debt, be a serious defense, why did he not plead it? Why did he suffer a judgment by default to be rendered against him? He must have known that a judgment by default is a tacit admission of the justice of the demand: Code of Pr., art. 360. His affidavit does not even show any reason why he did not or could not defend the suit in due time; and if he be made to suffer from his neglect, we can not, as the case stands, afford him any relief. We are of opinion that the district judge did not err in overruling the motion for a new trial.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed, with costs.

1. *Ingram v. Croft.*
2. *Oss v. Bethany.*

3. *Gleizes v. Faurie.*
4. *James v. Richard.*

AMENDMENT OF PLEADINGS AFTER OR DURING TRIAL, WHEN ALLOWED: The note to *Stevenson v. Mudgett*, 34 Am. Dec. 158, contains a full discussion of this subject in which the authorities are cited and reviewed.

NEWLY DISCOVERED EVIDENCE IS NOT A GROUND for a new trial, if merely cumulative and not conclusive in its character: *Smith v. Shultz*, 32 Am. Dec. 33, the note to which contains the cases heretofore reported in this series upon this subject.

GRAVIER'S CURATOR v. CARRABY'S EXECUTOR.

[17 LOUISIANA, 118.]

ACTION TO ENFORCE AN UNLAWFUL CONTRACT can not be maintained.

CONTRACT, THE CONSIDERATION OF WHICH RELATES to the perpetration of a fraud or contemplates the performance of an act prohibited by law, is unlawful and can not be enforced.

SIMULATED CONTRACT BY WHICH A TRANSFER OF PROPERTY is made to an apparent vendee, is not necessarily fraudulent so as to deprive the vendor of his right to compel the apparent vendee to comply with the conditions of the transfer, unless the object of the transfer was itself unlawful, or was intended to injure or defraud third persons.

CONTRACT BY WHICH AN APPARENT VENDEE AGREED TO SELL the property as his own, and, after deducting the amount of certain loans and advances made to the vendor to repay to the vendor the excess of the proceeds of the sale, the principal object being to defeat the claims of certain judgment creditors of the transferror, is fraudulent, and no action will lie by the transferror or his representatives to recover the surplus agreed to be repaid.

APPEAL from a judgment in favor of plaintiff. The opinion states the facts.

Eustis and Soulé, for the appellant.

L. Janin, contra.

By Court, BULLARD, J. The plaintiff, curator of the estate of Jean Gravier, represents in his petition that his intestate always conducted his business in a very careless manner, neglected his numerous engagements, and from the year 1803 to the time of his death suffered many judgments to be rendered against him, and much of his property to be seized and sold under execution. That being constantly in dread of executions and pressed for money, he early commenced a practice of concealing his property from his creditors by passing simulated sales of it, and making conveyances of his property to various persons who advanced him money on usurious interest, and who were to hold the property in trust for him and to secure their advances. It is alleged that the persons with whom these simulated con-

tracts were principally entered into were the late Nicolas Roche, and Etienne, Pierre, and Antoine Carraby. The petition enumerates several pieces of property which it is alleged were conveyed to the Carrabys by such simulated contracts without consideration, but intended to secure the said Carraby's occasional advances of money and to prevent the seizure of said property. The said Gravier always remaining the real owner of said property. It is further alleged that the affairs of Gravier in that manner became utterly deranged, and that in 1824 judgments were rendered against him for large amounts, and that the property remaining in his name was seized and sold, but that the Carrabys protected the property thus nominally conveyed to them from seizure. That after that period Jean Gravier abandoned his affairs as hopeless, and did not venture to let it be known that he was the owner of said property, but on the contrary, concealed his other property and denied his title to it, lest it should be immediately seized by his judgment creditors. The plaintiff proceeds to allege that the property thus conveyed was sold by the Carrabys, and the object of the present suit is to compel their legal representatives to account to the estate of Gravier for the value of the property thus alienated by them to the prejudice of Gravier. The judgment of the court of probates having sanctioned to a certain extent these pretensions of the plaintiff, the defendant prosecutes the present appeal. His counsel has interposed in this court a peremptory exception founded upon the alleged illegal and immoral character of the agreements between the original parties, and invokes the maxims of law, "*allegans turpitudinem suam non est audiendus*," and "*ex turpi causa non oritur actio*."

The counsel for the appellee contends in reference to this exception, that it ought not to prevail, because the plaintiff being curator of the estate of Gravier represents the creditors rather than the heirs, and that although since the institution of this suit it has turned out that the estate is solvent, and that the amount reserved may benefit the heirs, yet the principle relied on is inapplicable to the present case.

The first part of this argument assumes as a principle that contracts admitted to be reprobated by law, contrary to good morals and public order, may be enforced for the benefit of creditors, although not for the direct personal advantage of one of the parties. But the code declares that an obligation without a cause, or with a false or an unlawful one, can have no effect. The law gives no action to enforce them whoever may demand it, un-

less it be in cases of innocent holders of the evidence of such contracts in a commercial form. It is enough in the present case, in our opinion, that the legal representative of Gravier is plaintiff to let in the inquiry as to the turpitude of the transactions out of which this suit has grown.

By the Roman law the right to recover back what had been paid on an illicit contract depended upon the question which of the parties was dishonest or whether both were chargeable with the same turpitude. If the party who had received were alone dishonest, the sum paid could be recovered back even although the purpose for which it was given had been accomplished. "*Quod si turpis causa accipientis fuerit, etiam si res secuta sit, repeti potest.*" As in the case supposed by Julien of money paid to prevent the commission of sacrilege, robbery, or murder. But where both parties are chargeable with the same turpitude the law gives no action. "*Ubi autem et dantis et accipientis turpitude versatur non posse repeti dicimus.*" And the case supposed by Paul is that of a bribe given to the adversary's attorney, which could not be recovered back. "*Nam turpiter accepta pecunia justius penes eum est qui deceptus sit, quam qui decepit.*" In such cases the maxim is, "*In pari causa turpitudinis potior est causa possidentis.*" 5 Pothier's Pandectes, b. 12, tit. 5. These principles apply in cases where the corrupt or reprobated contract has had its effect, and the object of the action is to repair the injury complained of by one of the parties. It is hardly necessary to add that *a fortiori* the law will not lend its aid to enforce the performance of such contracts in the first instance. The principle has been held to apply not only in relation to the original corrupt or reprobated contract, but to any new engagements growing immediately out of it. The chief justice in delivering the opinion of the court of the United States in the case of *Armstrong v. Toler*, says: "No principle is better settled, than that no action can be maintained on a contract the consideration of which is either wicked in itself, or prohibited by law. How far this principle is to affect subsequent or collateral contracts, the direct and immediate consideration of which is not immoral or illegal, is a question of considerable intricacy, on which many controversies have arisen and many decisions have been made." After reviewing several of those cases the chief justice says: "One of the strongest cases in the books is *Steers v. Laushley*, 6 T. R. 61, where the broker had been concerned in stock-jobbing transactions and had paid the losses, drew a bill of exchange for the amount on the defendant and after

its acceptance indorsed it to a person who knew of the illegal transaction on which it was drawn, the court held that such indorsee could not recover on the bill." 11 Wheat. 258-274. This court has in more than one case recognized these principles, and especially in the case of *Mulhollan v. Voorhies*, 3 Mart. (N. S.) 48.

But the counsel for the appellant relies upon the case of *Greffin v. Lopez*, 5 La. 145,¹ as sanctioning a different doctrine, and upon 2 Chardon, *Traité du Dol et de la Fraude*. In that case the original intent of the parties does not appear to have been dishonest or immoral. One of the parties it was alleged entered into a simulated contract with the other in order to protect a part of his property from unjust lawsuits and prosecutions by certain enemies. It appears that there was also a counter letter executed. The object of the suit was to prevent the apparant vendee from disposing of the property as his own, after having obtained surreptitiously possession of the counter letter which alone showed the true contract or rather the absence of any contract between the parties. A simulation is not necessarily a fraud. It is only when injury to third persons is intended that it becomes fraudulent; and the decision in the case of *Greffin v. Lopez* does not appear to militate against the principles above expressed; for, if the simulation was at first innocent and not intended to injure third persons, the subsequent suppression of the counter letter and conversion of the property to the sole use of the apparent vendee was in itself a fraud against which the apparent vendor was probably entitled to the protection of the law. We are not prepared to say that the principle recognized in that case is applicable to the present. But we are referred to a French author who has treated *ex professo* the subject of fraud and simulation, and the plaintiff's counsel places great reliance upon him in support of his cause. The theory of this author is, that even in relation to the parties themselves simulation is a ground of radical nullity, and that each one may attack it against the other who seeks to consummate the intended fraud or by a new fraud profit by the first. He lays down an axiom well worthy of attentive consideration as the source in our opinion of the errors of his system, to wit: "that whatever may be the object or purpose of a fraudulent simulation it has that reprobated character only because it infringes a prohibitory disposition of the law. Now in this case it can have no effect." He then quotes the two articles of the

1. 5 Mart. 145.

code Napoleon, 1131 and 1133, corresponding to those of the code of Louisiana, which declare that an obligation without cause or consideration or with a false or unlawful one can have no effect; and that the cause is unlawful when it is prohibited by law, when it is contrary to good morals and public order, he proceeds to say: "We have nowhere either in the code or elsewhere any statute more absolute or less susceptible of exception; it is one of the fundamental principles of the theory of contracts, and it is established for the sole interest of the contracting parties, since in relation to third persons their condition is secured by article 1165; contracts have their effects only between the contracting parties and do not affect third persons."

Again the author says, "the contrary system is founded upon the axiom *propriam turpitudinem allegans non est audiendus*"—it will be instantly perceived that this axiom can be properly invoked only by third persons, when the author of the fraud seeks to use it as an arm against them. Another axiom not less moral may be opposed to it, "*nemini sua fraus patrocinari debet.*" But it is not by axioms so general and which are not re-enacted by any text of our code, that exceptions can be created to a rule so imperative as that set forth in the articles which we have first cited. This position, that the maxim which denies an action in reference to immoral or prohibited contracts has relation only to third persons, can not receive the sanction of this court. The whole of the fifth title of the second book of the digest treats the matter as it relates to the parties towards each other, either as the right to enforce dishonest and immoral contracts or to recover back what has been already paid in execution of them. Nor can we concur with that author in the opinion, that this stern morality of the Roman law has not been retained in our modern legislation. On the contrary we think that when the code declares that contracts prohibited by law or contrary to good morals or public order shall have no effect, it recognizes the same general principle, and although the fundamental precepts of the ancients "*honesté vivere, alterum non lædere, suum cuique tribuere,*" constituting the religion of the law, have not been expressly venerated as formal texts, yet they lie at the foundation of our jurisprudence, and that courts of justice are not reduced to the humiliation of adjusting among dishonest men the results of their unholy speculations or of protecting one party against another while engaged in a common purpose, at war with the best interests of society and subversive of public order.

It remains to inquire whether these principles are applicable to the case now before the court, and what was the true character of the dealing and contracts between the original parties. It is not denied that the pretended sale of lots and other property by Gravier to the Carrabys was for the double purpose of protecting the property against the pursuits of his creditors and of securing the reimbursement of certain loans of money and other advances with usurious interest; and that to a certain extent it was successful. That such contract was fraudulent and might have been successfully attacked as such by the creditors at the time, if they had had the proofs now before us, we can not doubt. The Carrabys were made to appear to the world as absolute owners, and thus the judgment creditors of Gravier were frustrated in their pursuits. The ultimate agreement was that the property should be sold by the Carrabys as theirs, and the price accounted for to Gravier over and above the amount of their advances, in preference to the judgment creditors. Would a court of justice have lent its aid to enforce such a contract? to carry out the fraudulent intentions of the parties? Could Gravier at that time have recovered damages from the Carrabys for the non-performance of such a contract? We think he could not. "*In pari causa turpitudinis potior est conditio possidentis.*" This action is brought by his legal representative to recover from the estates of the Carrabys the value of the property thus alienated together with damages. We conclude that the exception ought to be sustained.

It is therefore ordered, adjudged, and decreed, that the judgment of the court of probates be avoided and reversed, and that ours be for the defendant with cost in both courts.

CONTRACTS IN VIOLATION OF LAW or against public policy can not be enforced: *Spurgeon v. McElwain*, 27 Am. Dec. 266, in the note to which the cases contained in this series, upon this subject, are referred to. A discussion of the subject of the rights of parties to illegal or fraudulent transactions, will be found in the note to *Boyd v. Barclay*, 34 Id. 765

DUKE OF RICHMOND v. MILNE'S EXECUTORS.

[17 LOUISIANA, 312.]

BOROUGH OF BARONY IS A CORPORATION, under the laws of Scotland, constituted by sovereign authority, composed of the inhabitants of a particular district, organized under royal charter, making a grant of the lands included therein to a subject, and annexing to it the right to exercise within the territory a particular authority or jurisdiction.

SUCH CORPORATION MAY RECEIVE GIFTS INTER VIVOS OR CAUSA MORTIS, through the intervention of trustees.

DONATIONS INTER VIVOS AND CAUSA MORTIS may, under the laws of Louisiana, be made in favor of an alien when the laws of the country of which he is a citizen do not prohibit similar dispositions from being made there in favor of citizens of Louisiana.

PARTICULAR LEGACY CONSISTING OF A DEFINITE SUM of money is entitled to be satisfied in preference to all others.

PARTICULAR LEGACY IS A CHARGE UPON THE ENTIRE ESTATE, and if the heir be admitted before it is discharged, becomes a personal debt, whi/h he is required to extinguish out of the real as well as the personal estate, and interest thereon may be collected from the day of demand.

ALIENS ARE NOT EXCLUDED FROM INHERITING property of any description by the laws of Louisiana.

INCAPACITY OF ALIENS UNDER THE LAWS OF ENGLAND AND SCOTLAND extends to the acquisition of lands or heritable property by purchase or succession, but an alien may, in those countries, acquire property in, or make a will of, personal estate, and sue for personal debts.

PARTICULAR LEGACY, CONSISTING OF A SUM OF MONEY, would, by the laws of Scotland, be considered as a simple bequest of the money, and not of any heritable property, which, if a citizen of Louisiana were the legatee, he would not be incapacitated from receiving, and such citizen could recover the amount of the legacy in the courts of Scotland, notwithstanding a deficiency in the personal estate to pay personal debts or other preferable bequests of the testator.

LEGACY BEQUEATHED BY A CITIZEN OF LOUISIANA to establish a free school in his native town in Scotland, will be paid to the persons authorized to receive it, and the entire estate of the testator will, if necessary, be charged with its payment.

LEGACY OF MONEY SECURED UPON REAL ESTATE is not a heritable bond within the meaning of that term, as understood under the laws of Scotland.

APPEAL. The opinion states the facts.

Eustis and Shidell, for the plaintiff.

Canon, for the executors.

L. C. Duncan, for the orphan asylum.

Hoffman, for the absent heirs.

By Court, SIMON, J. This case arises out of the last will and testament of Alexander Milne, deceased, which contains the following disposition: "Unto the town of Fochabers (place of his nativity) I give and bequeath the sum of one hundred thousand dollars, to be employed in establishing a free school, with sufficient competent teachers, and supporting the said school, in the said town of Fochabers, for the use of the parishes of Bellie and Ordifish." The legacy is now claimed by Charles Gordon, duke of Richmond and Lenox, superior as feudal lord of the

burgh of barony and town of Fochabers; and by Alexander Marquis, baron bailie and sole magistrate for the administration of justice in said burgh of barony. They further allege that by virtue of the powers specially conferred upon Charles Gordon by a meeting of the inhabitants of the town of Fochabers duly convened, and at a meeting of the kirk session of the parish of Bellie, also duly convened, they are authorized to demand and receive the said legacy, for the purpose of applying the same in conformity with the said testamentary disposition; and that accordingly, they have appointed two agents and attorneys in fact, to represent them in the premises, and to receive on their account the amount of the legacy. They pray to be recognized as the persons authorized to claim said legacy, and that the amount thereof be paid over to their said agents, etc.

The defendants, to wit, the three executors of the last will of the deceased, the attorney appointed by the court to represent the absent heirs, the society for the relief of destitute orphan boys in the city of Lafayette, and the Poydras female asylum, joined issue by denying the capacity of the petitioners to take under the will; and by submitting to the court whether under the laws of Louisiana, the petitioners, being aliens, can be entitled to recover the legacy by them claimed for the purposes mentioned in the will. The court of probates rejected the plaintiffs' demand, gave judgment in favor of the defendants, and said plaintiffs appealed. Our attention has been called to two principal questions arising out of the denial of the plaintiffs' capacity to take under the will; and it is contended by the appellees: 1. That the town of Fochabers is not incorporated; and that therefore there is no person or corporation capable of receiving the legacy; 2. That under the laws of Louisiana, the plaintiffs, as foreigners, can not take under the will, because the laws of Scotland prohibit similar dispositions from being made in favor of a citizen of Louisiana.

1. Fochabers is a burgh of barony under the ducal family of Gordon, and governed by a bailie of his grace's appointment: Chambers' Gazetteer of Scotland, 437. It was incorporated as a burgh of barony by a royal charter of James VI., king of Scots, of the tenth of February, 1598, and forms one of a very large class which in Scotland are well known by the designation of burghs of barony. By the laws of Scotland, a burgh of barony is a corporate body, erected by the sovereign, and made up of the inhabitants of a determinate tract of ground, with jurisdiction annexed to it; they were erected by the sovereign either to

be holden of himself or in favor of subjects who enjoyed the property or superiority of the lands contained in the charter; from this difference, arises the division of burghs royal, and burghs of regality or barony: Erskine's Inst. of the Law of Scotland, b. 1, tit. 4, secs. 20, 30. The general law of incorporation applies to the burghs of barony, and they have power to administer their common good, to elect officers, to make by-laws, etc.: Bell's Principles of the Law of Scotland, No. 2191. Under this system of laws, the incidents to a corporation are these: 1. As a legal person the corporation has *persona standi in judicio*; it may sue or be sued, grant and receive, by its corporate name, etc. 4. It may purchase or hold lands, and be enfeoffed by its corporate name and title; and 5. It has perpetual succession, etc.: Id. No. 2169. The power or authority of the duke of Richmond in regard to the burgh of Fochabers, is acquired by inheritance, was originally derived from the crown, and is constituted by the royal charter of 1598; it has a form of government and a local magistracy, and the baron bailie is the chief and sole magistrate of the burgh, which office is now filled by Alexander Marquis, one of the plaintiffs. The evidence of distinguished jurists on the laws of Scotland, has been taken on this particular subject, from which it clearly appears that burghs of barony are proper corporations; and as such they are known and recognized in the Scotch law; those corporations are accounted persons, because they have their own proper stock, rights, and privileges as persons have, and as such are capable of receiving and holding property either absolutely or in trust by their representatives. Under the law of Scotland, if a bequest similar to the one in question had been made there by a will good in point of form, it could be claimed on behalf of the town or burgh of barony of Fochabers for the use of and in trust for the said town, and parish of Bellie, including the lands of Ordifish; and the same could be competently claimed by the baron and the baron bailie to be held on behalf of the inhabitants of the parish, including those of the town itself and the lands of Ordifish. In such case, the baron and baron bailie are empowered to act as trustees for the corporation, as they are authorized to represent them in all circumstances where it may be necessary to claim or enforce their rights or privileges as a corporate body. We must therefore conclude that the inhabitants of the town of Fochabers have a right to enjoy the privileges allowed them as a corporation, that as such they have capacity to receive by donations *inter vivos* or

mortis causa, and that they are legally and properly represented in this suit by their trustees.

2. According to the one thousand four hundred and seventy-seventh article of the Louisiana code, "Donations *inter vivos* and *mortis causa* may be made in favor of a stranger, when the laws of his country do not prohibit similar dispositions from being made in favor of a citizen of this state." This establishes a reciprocal right in favor of the citizens of the two countries, and it behooves us, therefore, to inquire, first, into the nature of the legacy under our laws; and secondly, to examine whether, under the laws of Scotland, a similar bequest may be made in favor of a citizen of Louisiana.

1. The legacy made by Alexander Milne to the town of Foehabers, is one of a sum of money; and being a particular legacy, it ought to be discharged in preference to all others: La. Code, art. 1627. Being also a movable legacy, it is to be paid out of the funds of the succession; but in default of such funds sufficient to discharge it, it is to be paid, as long as the estate is administered by the testamentary executors, indifferently out of the personal and real estate of the testator. It becomes a charge on the whole estate, and when the heir claims to be put in possession of the succession, and to take the seisin from the testamentary executor, he is bound to provide for the payment of the movable or pecuniary legacies, by offering to put in the hands of the executor a sum sufficient to satisfy them: La. Code, arts. 1661-1664; thus, such a legacy becomes a personal debt of the heir, which he must discharge as any other debt due by the succession, without any distinction being made whether it is to be satisfied out of his personal or real property; and interest is due thereon from the day of the demand: Id. 1619. The legacy under consideration is therefore a simple pecuniary bequest, which must be acquitted by the executors or by the heirs in the same manner as if it were a debt of the estate.

Before proceeding to examine the second question, it may be proper to remark, that the provision contained in the article 1477, of our code, is limited exclusively to the incapacity of receiving donations *inter vivos* and *mortis causa*, and that nothing in our laws shows that foreigners are excluded from the acquisition of real or personal property, by will or succession, and that they are not capable of inheriting either: La. Code, arts. 881, 882. The capacity of aliens to transmit their estates *ab intestato*, and to inherit from others in Louisiana, is on the contrary clearly shown by the article 945, which declares that slaves alone are in-

capable of either; and as under the article 946, the incapacity of heirs is not presumed, he who alleges it must prove it. There is therefore nothing in the laws of this state that excludes aliens from the inheritance of any kind of property.

2. The incapacity of aliens by the English and Scotch laws is only extended to their holding lands or acquiring heritage, either by purchase or succession: Erskine's Inst., b. 3, tit. 10, sec. 10; Bell, Nos. 1644, 2135; 1 Bl. Com. 272, *et seq.*; 2 Kent's Com. 61. Under the laws of Scotland, an alien may acquire property in goods, money, and movable estate, and make a will and sue for personal debts: Bell, No. 2135; and under those of England, he may even be a mortgagee and recover his debt in countries where there is a positive prohibition to hold lands: Powell on Mortgages, 106. The opinion of the lord advocate of Scotland and of the other jurists who have been examined on this subject, demonstrates clearly that if the legacy had occurred in a Scotch instrument, it would, by the laws of Scotland, have been considered as a pure bequest of a sum of money, and not of heritable property; and that if a person in Scotland had bequeathed a legacy in similar terms to one of our citizens, the courts of law in that country would without hesitation give effect to the legacy. The reason is drawn from the very expressions of the Scotch laws, and is very obvious: a legacy, in general, according to those laws, is defined to be a donation or bequest *mortis causa* of a sum, or subject, or *universitas*, to be paid or delivered by the executor out of the free movable estate of the deceased, to a person named or plainly denominated; and a general legacy, or the *legatum quantitatis*, is a legacy not of a special article or debt, but indefinite, of so much money, or fungibles, or movables of a particular description or class: Bell, Nos. 1871, 1873. In this case, the bequest of a fixed sum of money is purely movable in its nature, and is not one depending on, secured by, or in any manner attached to heritable property; it must consequently be paid out of the estate, without any reference to any particular real estate, and under the Scotch laws would come within the definition of the *legatum quantitatis*. On this subject, the lord advocate informs us further, that although by the law of Scotland, an alien could not hold heritable property there, either by purchase or succession, there is no doubt that if a Scotchman died, leaving to a citizen of Louisiana, a sum of money payable out of personal estate, or out of real estate, directed by him to be sold, or payable by the disponees in the *universitas* of his estate, heritable and movable,

such citizen would recover that sum in the courts of Scotland, notwithstanding a deficiency in the personal estate to pay the testator's personal debts or preferable bequests.

These principles of the Scotch law, which are derived from the Roman or civil law, are very similar to ours: La. Code, art. 1661. They contemplate the payment of a pecuniary legacy in the same light as the payment of a debt due by the estate; it must be discharged; and the nature and the object of the legacy being alone to be considered, the legatee can not claim but the money, without his being entitled to exercise any right or control over the heritable property, out of which the funds are to be raised to satisfy the bequest; if it be necessary to sell lands for the purpose of discharging such movable legacies, the price of such lands so sold by the owner or by the executor becomes movable, and as such, must be applied to the payment of those legacies; although it can not be said that such legacies are debts secured upon land, and of a heritable character: Bell, Nos. 1478, 1479. We have an instance of a bequest made by an English subject to the United States, the amount of which, of about one hundred thousand pounds, was regularly paid over to our government. It is the bequest made by James Smithson, of London, to the United States, for founding at Washington an establishment to be styled the "Smithsonian Institution, for the increase and diffusion of knowledge among men." In December, 1835, the president of the United States transmitted to congress a report from the secretary of state, together with the papers and documents relative to said bequest; congress acted upon the recommendation of the president, and a law was passed accordingly for the purpose of accepting the bequest and the trust: See vol. 2, document 25, 1st session 24th Congress; vol. 9, Laws of the United States, p. 439. We see no reason, therefore, why the same reciprocity should not be extended under the laws of Louisiana, to English and Scotch subjects, when it is clear that according to the laws of their country, our citizens would be entitled to recover similar legacies.

Much has been said, however, to convince us that the legacy is heritable in its nature and effect; and it has been urged that all that proceeds from immovable property is immovable, and that any sum of money secured upon real property is a heritable bond. According to the Scotch laws, all subjects (things) which were immovable by the Roman law, as a field or whatever is either part of the ground, or united to it, *fundo annexum*, as minerals, houses, wells, etc., are heritable; and heritable objects are those

which on the death of the proprietor, thus descend to the heir: Erskine, b. 2, tit. 2, secs. 3, 4; Bell, Nos. 1470, 1471, 1472. Rights connected with or affecting lands, though not feudalized, are heritable; as servitudes, reversions, faculties, and rights to challenge deeds relating to heritage: *Id.* No. 1485; Erskine, b. 2, tit. 2, sec. 5. Thus naked charters, or the disposition of the property or superiority of lands, or heritable bonds, though seisin has not proceeded on them, are heritable, because they are all rights of or securities upon land, and the proprietor or creditor may complete them by seisin, when he shall think proper. On the other hand, whatever has no resemblance to a feudal right, and produces no annual fruits, is movable; by this rule, cash, jewels, etc., are all movable subjects; all subjects bearing interest *ex lege*, are movable in all respects; simple personal debts and engagements, whether presently due or payable at a future term with interest, are movable; as also the price of lands sold by the owner: *Id.* b. 2, tit. 2, secs. 7, 13; Bell, No. 1479. The distinction is very clear and obvious, and it suffices to state that the reason of the Scottish bonds being heritable, originates evidently from the feudal tenure of the lands, and from the creditors being invested with or having a right to the seisin of the land, which none but a subject can hold: *Id.* Nos. 1485, 1478, 1493, and 1644; Erskine, 216, 222, 402. In the present case, how could the legacy, if made in Scotland, be considered as a heritable bond? We have already demonstrated that the legatee has no right connected with or affecting lands, and less so is he entitled to be invested with the seisin of any land; the bequest does not carry with it any right of infeftment (enfeoffment), its amount is to be paid in money out of the movable estate of the deceased; it becomes the debt or personal obligation of the heir; he must satisfy it as any other debt, not only out of the funds of the succession, but if necessary, out of any funds proceeding from the sale of property, either personal or real, to be sold or disposed of by the executors or by himself for that purpose.

We think, therefore, that the doctrine of heritable bonds would not apply to the bequest in question, if made in Scotland; and that the judge *a quo* erred in not giving full effect to the legacy under consideration. With regard to the interest allowed by law, from the day of the demand of the legacy, it can not be included in our judgment, because it has not been claimed.

It is therefore ordered, adjudged, and decreed, that the judgment of the court of probates be annulled, avoided, and re-

versed; and proceeding to give such judgment as, in our opinion, ought to have been rendered in the court below, it is ordered, adjudged, and decreed, that the plaintiffs be recognized as the persons duly authorized and entitled to claim and receive the legacy of one hundred thousand dollars mentioned in the last will and testament of Alexander Milne, deceased, as being made to the town of Fochabers; and that the amount thereof be paid over to plaintiffs' agents named in the petition, by the testamentary executors of the said last will and testament, with costs in both courts.

RIGHTS OF ALIENS TO ACQUIRE LANDS or personal property by purchase or succession. This subject is considered in the notes to *Elmendorff v. Carmichael*, 14 Am. Dec. 97, and *Commonwealth v. Hite*, 29 Id. 233. At common law, an alien had no heritable blood, and could not receive or transmit lands by descent: *Jackson v. Fis Simmons*, 24 Id. 198, the note to which contains other cases, cited from this series and elsewhere, in relation to the subject.

HYDE v. PLANTERS' BANK.

[17 LOUISIANA, 560.]

BANK IS NOT LIABLE FOR NEGLIGENCE OF A NOTARY employed by it to protest a promissory note.

NOTARY IS PERSONALLY LIABLE FOR NEGLIGENCE to comply with the law in recording his protest and notice, whereby the indorsers of a note delivered to him for protest were discharged.

APPEAL. The facts are stated in the opinion.

I. W. Smith, for the plaintiffs.

T. Slidell, for the defendants.

By Court, MORPHY, J. The petitioners allege that they deposited with the defendants at Natchez, in the state of Mississippi, a promissory note for collection; that defendants undertook and bound themselves to use all care and diligence in collecting said note, and in case of non-payment to cause good and legal notice thereof to be given to the indorser, Robert J. Walker. That at the maturity of said note, defendants caused the same to be placed in the hands of T. Redman, a notary public, residing at Natchez, and qualified according to law to demand payment thereof, and to notify in a legal manner the said indorser; that it was the duty of the said Redman not only to notify said Walker of the non-payment of the note, but also to make and keep a fair registry of all his official acts in the premises, and to state the manner in which said notice was forwarded;

that said note was protested for non-payment by the said notary, who omitted to notify said Walker, and also to keep any register relating to such service, by which fault and negligence the said indorser was released from all liability; that on an action being brought by them against said Walker before the circuit court, in and for the county of Adams, in Mississippi, a verdict was rendered against them because no proof could be furnished that said indorser had been duly notified of the protest, and that no such proof existed in consequence of the fault and negligence of the notary, in omitting to make a full and true record of the service of the notice, as required by law, whereby the petitioners aver that the defendants have become responsible unto them for the amount of such note with interest, and the expenses of the suit against the indorser. The general issue was pleaded. There was judgment below for plaintiffs, and the defendants appealed. The plaintiffs introduced in evidence the record of the suit in which Walker was discharged. It clearly appears from the evidence as well as from their own averments, that their failure to recover in that suit was entirely owing to the neglect and omission of the notary, Redman, to make a proper and sufficient record of the manner in which he had served notice on this indorser; the notary having died before the trial, and his record being so deficient as to make no legal proof of such notice, the plaintiffs remained without any evidence whatever to establish this material fact, and a verdict was rendered against them.

The question is, whether this neglect of duty on the part of the notary is chargeable to the defendants; or whether the notary, being an independent sworn officer, acting under the authority of the state of Mississippi, was not, as such, the agent of the plaintiffs as much as the defendant, and liable directly to them? The solution of this question, in our opinion, depends on the character of the acts he omitted to do or performed in an illegal or inefficient manner. By reference to the statute law of Mississippi, which has been given in evidence, it is provided "that notaries public, not to exceed three in number in each county, shall be appointed and commissioned by the governor upon the recommendation of the county court of the several counties; and that before entering upon the duties of their office they shall take and subscribe an oath, and shall give bond with two good and sufficient sureties in the penalty of two thousand dollars, conditioned for the faithful performance of the duties of their office; which bond shall be recorded with

the clerk of the county court of the county where they reside, and may be sued on by any party or parties injured, in like manner and with like effect as bonds given by sheriffs and coroners for the faithful execution of their respective offices." It is further provided, "that when any notary public shall protest any promissory note, bill of exchange, or other instrument of writing, he shall make and certify on oath a full and true record of what shall have been done therein by him in relation thereto according to the facts by noting therein whether demand for the sum of money mentioned in the same was made, of whom, and where the requisite notice or notices were served and on whom, when the same were mailed (if such be the case), to whom and where directed, and every other fact in any manner touching the same shall be distinctly and plainly set forth in his notarial record; and when so made out and certified it shall have the same validity, force, and effect in all courts of record within the state as if the said notary were personally present and interrogated in open court," etc. From these enactments it was clearly a part of the official duties of the notary to have kept a full and fair record of the manner in which he had served the notice of protest on Walker. The testimony shows that if this had been done, plaintiffs would have had no difficulty in recovering of the indorser; the notary had thus made himself and his sureties liable on his official bond to any person injured by his neglect and failure to comply with this duty imposed upon him by law.

Can the defendants then be held responsible for his default? We think not. They used that care, attention, and diligence which men of common prudence bestow on their own affairs. They did for plaintiffs all that the latter would have done themselves had they retained the note in their possession. When the holder of a note wishes to possess evidence of the service of a notice on an indorser, he must of necessity substitute another person to perform the service; from the corporate character of defendants it was known that it could be performed by them in no other way than by substitution. In this necessary selection of a subagent, common prudence suggested to defendants the propriety of employing one not only competent in every respect to do the particular act of giving notice to the indorser, but whose official duty it was to make out a record, which in case of his death would preserve for plaintiffs, legal evidence of the service he had performed. But the notary, in making out the record required by law, neglected in this case to

mention the place to which the notice of protest had been sent to the indorser, and the testimony shows, that he being dead at the time of the trial, no proof of such notice could be made, either by his record or otherwise. To make defendants responsible for this neglect of official duty on the part of the notary, would be rendering them the sureties of that officer; it would be changing the ground upon which alone they can be held liable, to wit, that of negligence in the discharge of their duty to their principals. It is in evidence that T. Redman was the notary of defendants, and did all their business of the same description. If, instead of employing him, defendants had given the notice to one of their clerks, or any other individual however competent, and after performing the service, the latter had died, plaintiffs would have had just cause to complain that a course was pursued for them different from that which defendants had found proper and beneficial for themselves. But by acting as they did, it appears to us, that their undertaking was fully satisfied. If, by the fault or neglect of the notary they employed for plaintiffs, the latter have suffered any injury, they must look to the sureties on his official bond, because such fault or neglect was a breach of his official duties: *Montillet v. Bank of the United States*, 1 Mart. (N. S.) 368; Story on Agency, 189, sec. 201; La. Code, arts. 2977, 2978; *Smedes v. Utica Bank*, 20 Johns. 377.

It is therefore ordered that the judgment of the district court be reversed, and that ours be for the defendants with costs in both courts.

BANK IS LIABLE FOR NEGLIGENCE OF A NOTARY employed by it, with respect to giving notice of non-acceptance of a bill of exchange, that not being a purely official act; as to acts that are strictly official, the rule may be otherwise: *Allen v. Merchants' Bank*, 34 Am. Dec. 289, in the note to which the cases hitherto reported in this series, in relation to this subject, will be found, together with a full review of the authorities.

MUNICIPALITY No. 2 v. ORLEANS COTTON PRESS.

[18 LOUISIANA, 122.]

RIPARIAN ESTATE IS ENTITLED TO THE ALLUVIAL ACCRETIONS that may be formed upon its front.

LEGISLATURE CAN NOT DEPRIVE A RIPARIAN PROPRIETOR of his right to the future alluvion that may be deposited upon his river front.

IDEM.—CHANGE IN CHARACTER OF PROPERTY FROM RURAL TO URBAN, effected by its incorporation as a city, does not deprive it of the right to future formed alluvion.

PRINCIPLES OF THE ROMAN AND SPANISH LAWS, with respect to alluvion, explained.

PRINCIPLE THAT GIVES ALLUVION TO THE RIPARIAN PROPRIETOR upon whose front it is deposited, is founded upon the consideration that his exposed situation burdening him with the risk of loss through the agency of the river, he should be allowed the benefits which its contiguity may confer, as a compensation. It in no manner depends upon the duty of keeping up levees and embankments to guard against the overflow of the river. To the same point, Garland, J.

INTERVENTION OF A PUBLIC ROAD BETWEEN A TRACT AND A RIVER does not prevent the gain by alluvion from belonging to such tract.

DEDICATION, WHAT NOT.—WHERE A TRACT FRONTING ON A RIVER, and adjoining a city wherein it is afterwards incorporated, is divided by its owner, on a plan thereof, into city lots, streets being laid off thereon in continuation of those of the city, and lots are sold with reference to such plan, if on the plan between the river and nearest parallel street a vacant strip is left, which is not divided into lots, but on which no word is written indicative of an intent to dedicate to the public, no presumption of an intention to dedicate such strip to the uses of commerce or otherwise to the public, will be presumed. It will be different, if on the vacant strip such a word as "quay," or other word indicative of such intent, is written. To the same point, Garland, J.

WHERE A PUBLIC USE EXISTS IN THE BANKS OF A RIVER, the future alluvial accretions will be subject to the same use; but the right of property therein will be vested in the same person in whom is the property in the bank; and it seems that when, by reason of the increase by accretions, any part of the original bank is no longer needed for the exercise of the use, the owners of the right of property therein will also be entitled to its occupation.

The case appears from the opinion. A description of the plan of the faubourg, made by Mrs. Delord, appears in the opinion of Garland, J.

Manureau, L. Peirce, and Carter, for the plaintiffs.

Preston, Roselius, R. Hunt, Eustis, Soulé, and Hoffman, contra.

BULLARD, J. In this cause, the court has had the advantage of an able and elaborate discussion on both sides, as well in writing as oral, in which have been displayed the great resources of the bar in ability and varied learning. We have been enabled at our leisure to weigh the arguments and examine the authorities on both sides, and to give to the whole subject that patient and dispassionate consideration due alike to the vast interest at stake, to the character of the parties, and to public expectation. It would have been more satisfactory to ourselves if we could have been unanimous as to the final result; but as there exists some difference of opinion among the judges, I proceed to pronounce mine, and to set forth the grounds and rea-

sons upon which it rests. I will not affect to conceal with what anxiety I examined again and again the principal question in the case, when I discovered that I should have the misfortune not to concur with the senior judge, who had been for so many years familiar with the vexed question of the batture in all its phases, while this is the first occasion, upon which it has been discussed, since I have been a member of this tribunal.

The municipality claims to be owner of the alluvial formation fronting the suburbs Delord and Saulet, between New Levee street and Front street, bounded on the upper side by Roffignac street and by property in lots separating it from Benjamin; which lot or parcel of land, it is alleged, was formed by alluvion long after those suburbs were laid out as faubourgs of the city of New Orleans, and after they were actually attached to, united with, and incorporated into, and made a part and portion of the city of New Orleans, or was at each of the said epochs, so inconsiderable in its formation and extent as to be incapable of individual possession, use, or occupation of any kind whatever, without the use of artificial means, the same being even at the lowest stages of the water of the river barely perceptible, and all the rest of the year entirely covered and forming a part of the bed of the river—by reason of which incorporation with said city (the petition goes on to allege) and the laying out and dividing the said land, of which the said faubourg is composed, into town lots, streets, etc., as a part of said city, the title to all the said batture or alluvion then so imperfectly formed, or thereafter to be formed, became by law vested in the corporation of the said city of New Orleans, for the sole and exclusive use of the public and is now vested in the plaintiffs.

Upon the lot of ground thus described, it is alleged, the defendants have erected buildings and stores for pressing cotton, etc., and have appropriated the same to their sole and exclusive use as their property, and to the entire exclusion of the public, and have converted the natural and lawful destination of the said land to public purposes and uses into private property. It is further alleged that within the last ten years there has been formed in front of the lot of land above described, by gradual deposit of the river, a considerable space of batture or alluvion, now vacant and unoccupied except for public uses, and which is in like manner vested in the said second municipality for public use and benefit, and that the defendants, pretending to claim the same as their private property, and as forming a part of the ground described, have menaced and, as the petitioners believe,

are about to occupy the same and to convert it to their own use to the exclusion of the public. The plaintiffs conclude by praying judgment that the title is vested in the plaintiffs for the uses and purposes above mentioned, and that the defendants be forever enjoined from any use, occupation, or possession thereof, and for damages.

The defendants first pleaded the exception of *res judicata* founded upon the judgment rendered in the case of *Henderson et al. v. The Mayor, Aldermen, and Inhabitants of the City of New Orleans*,¹ and in case the same should be overruled, they deny all the facts and allegations in the petition so far as they assert any color or pretense of title in the plaintiffs to the premises described: and they deny the plaintiffs' title to any alluvion already formed or which may hereafter be formed in front of said premises. The respondents further aver, that they are the riparian proprietors of the property claimed by the plaintiffs, and as such entitled to all the alluvion which has been formed or may be formed in front of their said property. That they possess the same with all its rights and privileges, and especially as a part thereof, the right of alluvion, in virtue of a sale or concession of the king of France. That the said property with all its said rights was vested in these respondents, and those through whom they claim, from the date of the said sale or concession, and that they can not be divested of their right without their consent, and without a just and previous indemnity. They further aver that the plaintiffs have repeatedly admitted and recognized their right and title by formally putting them in possession of sundry portions of batture successively formed before their property and attached thereto since the incorporation of the city in 1805, by charging them with all the burdens and duties of front proprietors, and by various other acts by which the respondents' right is distinctly recognized.

Upon these pleadings the parties went to trial in the court below, and the exception of *res judicata* having been sustained as to the lots of ground first described, upon which the defendants had erected their warehouses, and overruled as it relates to that portion of the alluvion lying on the outside of the levee and in front of the same property; and after a trial upon the merits, judgment having been rendered in favor of the plaintiffs for the land last described, according to the prayer of the petition, the defendants appealed. The municipality has not appealed from that part of the judgment sustaining the exception of *res judicata*,

1. 9 La. 563, and 5 Id. 416.

as to that portion of the property in controversy upon which the defendants' buildings are erected, but they ask a modification of the judgment in that respect. We have therefore first to inquire into the question whether the judgment in the case of *Henderson et al. v. The Mayor, Aldermen, and Inhabitants of the City of New Orleans* forms a bar to this action, as carrying with it the authority of the thing adjudged between these parties.

A careful examination of the arguments and authorities on this point has failed to satisfy my mind that this exception ought to have been sustained in the court below. It appears to me so doubtful that I think the judgment in this particular should not be disturbed, and that the whole case is fairly open before us on the merits, on the answer to the appeal. Proceeding, therefore, to examine the case upon the merits, I begin by assuming as undisputed facts, that the Jesuits' plantation, of which the lots in rear of the premises in controversy formed a part, was from its local situation, fronting on the Mississippi, and exposed to abrasion by its currents, entitled to any alluvial accretion upon its front, and that such was the condition of things in 1805, when the city of New Orleans was incorporated by an act of the territorial legislature, and the property in question embraced within its limits. That in 1806 or 1807, a part of the land was laid out as the Faubourg Delord, and lots sold in conformity to the plan. Such being the case, if the same land or that part of it which still fronts upon the river has ceased to enjoy the same advantage, to the profit of the owners of such front, or has lost the right of accretion, and since that period the alluvion formed belongs not to the owners of the front lots, but to the city, such a change—such a dismemberment of the property—must have resulted either from the operations of law, or from the consent of the former or the present proprietors. It would seem, therefore, that the inquiry before the court is twofold: first, into the effect of the act incorporating the city and embracing the property in question, now composing the faubourgs Delord and Saulet within its limits; and secondly, whether the laying out of the faubourg as shown by the plans and disposing of lots in conformity thereto, or any other acts of Madame Delord or her successors, taken in connection with the various ordinances of the city council, furnish sufficient legal evidence of an intention, on her or their part, to dedicate the property claimed by the plaintiffs, to public uses, so as to constitute a *locus publicus*. Under the first head I will consider merely the legal operation of the act of 1805, wholly in-

dependent of the will of the then proprietor, and how far the character of the property was changed thereby from rural to urban, so far as it regards the right to profit afterwards by any alluvial increase; and under the second, I will consider the effect of the same act, together with the several ordinances of the city council, and especially that of 1831, by which a part of the faubourgs Delord, Saulet, and Lacourse were finally incorporated, as it is termed, that is to say, admitted to all the advantages and subjected to all the burdens of the square of the city, taken in connection with the acts and declarations of the parties.

1. If the act of 1805 which incorporated and defined the limits of the city of New Orleans, embracing a large extent of territory from Lake Pontchartrain to the river and numerous plantations fronting on the Mississippi, and all previously entitled, according to the existing laws, to any alluvion which might be formed upon their front, had declared in explicit terms, that after the passage of that act, the owners of such tracts of land fronting on the river should no longer be entitled to any alluvion which might be formed, but that the same should thereafter accrue to the benefit of the city, there is not perhaps a single mind, capable of discriminating between the legitimate exercise of legislative authority and acts of sheer spoliation, that would not pronounce such an enactment to be without any constitutional validity. Will it be said that the right to future alluvial formations is not a vested right? I answer that such right is inherent in the property itself and forms an essential attribute of it, resulting from natural law in consequence of the local situation of the land, just as much as the natural fruits of a tree belong to the owner of the land; and that such an attempt to transfer from the owner of the land to the city, the future increase by alluvion, would be as legally absurd, as if the legislature had declared, that after the incorporation of the city, the fruits of all the orange trees within its limits should belong thereafter to the city and not to the owners of the orchards and gardens. If such would be our judgment upon an express enactment, *a fortiori*, should we declare that such an effect could not follow by mere implication?

But the argument is, as I understand it, that the character of the property was changed from rural to urban by the incorporation of the city; and inasmuch as urban property does not by law enjoy the right of alluvion, as is contended, consequently after that period, the city is entitled to the increase and not the front proprietors. Admitting for the present, and for the pur-

poses of this argument, that by the Roman and Spanish laws, the right of alluvion is not enjoyed by urban estates, and that they form an exception to the general rule, yet it appears to me the same difficulty recurs; for if the legislature without my consent places my property in a new category or gives it a new classification, or in consequence of which it is shorn of one of its original attributes, it is not easy to distinguish such an act from one by which the same result is sought to be obtained by direct enactment. It is after all but a circuitous way to the attainment of the same end, and is equally repugnant to the first principles of justice and to all constitutional restraint upon the legislative power. This argument presupposes that the original tract was entitled to alluvion, and I now speak only of the effect of the act incorporating the city and extending its limits so as to embrace the Jesuits' plantation; without regard to any subsequent acts of the front proprietors, from which an intention to dedicate to public uses might be inferred, and it appears to me, that in truth the act of incorporation might be laid entirely out of view and our inquiry confined to the evidence of dedication—on this point, the court I believe is unanimous.

But supposing these principles are questionable, and that I am mistaken in this view of the subject, is it true that urban property fronting on the river is not entitled to alluvion, and that such an exception is recognized by the Roman or the Spanish law? This question leads me briefly to look into the doctrine of alluvion, its foundation and its limitations and exceptions. The doctrine, in my opinion, does not cover a very wide space, and in this discussion, the question as it has been treated, and as I propose to treat it, becomes one rather of language and philology than of law. The Roman legislator, instead of giving the more exact and scientific definition of our modern codes, announces with oracular brevity, a great rule of natural equity: "*Præterea, quod per alluvionem agro tuo flumen adjecit jure gentium tibi acquiritur*," which I translate as follows: "Moreover, whatever the river has added to your land becomes yours by the law of nature (or nations)." I use the English word land instead of field, because it appears to me that the word *ager* in the text is employed in its primitive sense to signify land or soil in the abstract, without regard to any idea of property or to any particular form or size, or shape, precisely as it is in the Greek, from which it is derived (*agros*), and as it is the compounds into which it enters both in Latin and several modern languages, such as "*agricultura, agricola, agrarius*,

and *agrimensor*." It will not be pretended that agriculture is confined in any language to the culture of a field without a house or other building upon it, as the word *ager* signified according to Rodrigues and even the Roman digest. The language itself furnishes internal evidence that such was its primitive meaning, for the earliest as well as the most useful of human arts, that which in a great measure feeds and clothes the great family of man, derives its name from that word in combination with another which signifies to cultivate. Again, alluvion is a right founded on natural law, in which the maxim certainly applies with all its force, that where the reason is the same, the law is the same, and would that law distinguish between two contiguous estates or tracts of land fronting on a watercourse, and equally liable to be wasted by its encroachments, deny to that which should have a building upon it, the natural chances of accretion, while it gives it to the other? I think not, any more than agriculture should be taken to mean the tilling of a field on which no edifice exists. That the word *ager* was sometimes employed to signify something different there is no doubt, and so is land in English; its primitive signification is soil, ground; but it sometimes means a country or territory, as "the land of my fathers," "the land of Canaan." This arises from the poverty of human language and the impossibility of having a distinct word to signify every object in nature, and all the infinite varieties and shades of ideas. The Roman language at an early period was as poor as the Roman people. Witness the fragments of the twelve tables which it requires a profound antiquarian to decipher. But it adopted new words, with as much avidity as the Romans accorded to subject tribes the rights of citizenship; and we have the authority of Horace for saying that even in the Augustan age new words were always welcome, provided they flowed from a Grecian source.

"Et nova factaque nuper habebunt verba fidem, si
Græco fonte cadant, parçé detorta."

Not only the same word came to have different significations, but new and sometimes odd combinations of words were resorted to in order to express new ideas or objects. The word *prædium*, for example, about which so much has been said in the course of this argument, is supposed to have been derived from the word *præda*, which means plunder, because it was originally an allotment of land, the spoils of conquered tribes; as the word plunder among a certain class of our citizens, is used to signify the scanty chattels of the poor.

Much stress is laid upon the definition of *ager*, in the *Partidas*, law 8, tit. 33, par. 7, to prove that it was only fields without buildings on them, which enjoyed by the Roman law the right of alluvion. It is true the *Partidas* says it means in Latin "como campo para sembrar en que no ha casa ni otro edeficio fueras ende alguna cabaña ó choça para cobrar los frutôs." The authority of even Alphonso the Wise, to fix by statute the meaning of a Latin word, may well be questioned. That it did not always bear that narrow meaning, and sometimes signified land or soil in general, is manifest from the usage of the best authors. Virgil, for example, speaks of Sicheus, the first husband of Dido, as "ditissimus agri Phœnicum"—meaning, as I understand it, the richest of the Phœnicians in land—and afterwards of Camertes, as the richest of the Ausonians in the same species of property. It is probable each had something more than a field without a house. Æneas was promised in his future empire "a rich exuberance of soil—divitis uber agri." In the first book of the *Georgics* we find within the compass of a few lines the words *tellus*, *arvum*, *ager*, *terra*, and *campus* used, as nearly synonymous. But in the following lines I think the word *ager* is most manifestly used as contradistinguished from *arva*, which we all know means fields; the soil is represented as parched with heat, while little streams are conducted so as to irrigate the fields; so that *ager* implies more than one field.

"Et cum exustus ager morientibus æstuat herbia,
Ecce supercilio clivosi tramitis nudam
Elicit: illa cadens rancum per levia murmur
Saxa ciet, scatebrisque arientia temperat arva."

But without relying too much upon the authority of the poets, we have that of Niebuhr, one of the most profound scholars and acute philologists of modern times, and who had made the agrarian institutions of Rome the subject of long and laborious investigation. This authority, I venture to say, is worth all the lexicographers, whose works have been consulted and referred to in argument. In an appendix to his second volume of the history of Rome, he gives us much information concerning the Roman mode of partitioning landed property, the *limitatio* or survey, and the peculiar terms of the ancient national law. He says, "*ager*, a district, was the whole territory belonging to any civil community, in opposition to *terra*, a country, which comprised many such proprietary districts; as for instance, *terra Italia Græcia*. All landed properly (*ager* in its restricted sense), was either Roman or foreign—"aut Romanus aut peregrinus." All

Roman land was either the property of the state (common land, domain) or private property—"aut publicus aut privatus." The public domain is always called *ager publicus*, there was also *ager vectigalis*, and *ager municipalis* according to the same author, and mentioned in the pandects.

But the text of the pandects shows that the word *ager*, in reference to this subject of alluvion, was used indiscriminately with *fundus* and *prædium*. In three successive paragraphs these words are thus used: 1. *Præterea quod per alluvionem agro nostro flumen adjecit jure gentium nobis acquiritur.* 2. *Si vis fluminis partem aliquam ex tuo prædio detraxerit et meo prædio attulerit, halam est eam tuam permanere.* 3. *Plané si longiore tempore fundo meo hæserit arboresque quas secum traxerit in fundum meum radice egerit: in eo tempore videtur meo fundo acquisita esse.* It will hardly be contended that in these three paragraphs the three different words employed imply as many different kinds of estates. Indeed, throughout the whole remainder of the first title of the forty-first book of the pandects, which treats of islands formed of the beds of rivers becoming dry in consequence of a change of course, and returning again to the same channel, the words *ager*, *prædium*, and *fundus*, are used indiscriminately, indicating rather a difference of style among the different juriconsults who contribute to that great work, than any essential difference of landed property upon the margin of the streams. In no part of it do I find any exception to the right of alluvion, unless it be that established by the law in *agris limitatis*, of which I shall have occasion to speak presently. It is essential that the land should be bounded on one side by a watercourse, but it would seem to have been immaterial by what name the riparian estate was called.

Cities may acquire *jure alluvionis*, it is contended. This I do not doubt, but then it must be as proprietor of the front or as riparian proprietor. It would be absurd to say it could be otherwise, for that is of the very essence of the right; the alluvion is but accessory; the front tract is the principal—the former can not exist without the latter.

But to return to the law in *agris limitatis* which is greatly relied upon to show that cities may acquire *jure alluvionis* in some manner not easily understood. Such a construction of that law is apparently countenanced by what fell from the court in the case of *Packwood v. Walden*, 7 Mart. (N. S.) 90, in which it was said, "According to the law of the Roman digest in *agris limitatis*; although the right of alluvion is denied to fields of

that description, yet it is granted to land on which a city is founded." I think this an error arising from a hasty consideration of that law, and a translation manifestly erroneous. The text is as follows: "In agris limitatis, jus alluvionis locum non habere constat; idque et Divus Pius constituit. Et Trebatius ait, agrum qui hostibus devictis eâ conditione concessus sit ut in civitatem veniret habere alluvionem neque esse limitatum. Agrum autem manucaptum limitatum fuisse ut scieretur quid cuique datum esset, quid venisset, quid in publico relictum esset." The translation of this law as given by the senior counsel of the plaintiffs is as follows: "It is certain that the right of alluvion does not take place in limited fields. This has been decided by a constitution of the Emperor Antoninus; and Trebatius says that land taken from a conquered enemy and conceded under condition of belonging to a city, enjoys the right of alluvion, and is not considered as limited," etc.

This translation is certainly justified by that of Hulot into French, who appears to consider the expression "*eâ conditione concessus sit ut in civitatem veniret*," as expressing a grant to a city of land taken from the enemy. But such a construction is, in my opinion, contrary to the idiom of the language, as well as irreconcilable with the history of the times to which it refers. If it had been the intention to express a concession to a city, the word expressing the grantee would have been in the dative, *civitati*, perhaps more properly, *urbi*. If, as is supposed by the plaintiffs' counsel, the city is the grantee, the words *ea conditione* are not only surplusage, but they make nonsense of the passage. Does the grantor make a condition with the grantee, that the thing given shall belong to the latter? If A. gives to B. a tract of land, it belongs to the donee without any such condition. There can be no condition in such a case; with whom would it be stipulated? With the grantee? Then you would do so vain a thing as to make the grantee or donee consent to a condition, that the thing should belong to himself, which is already his by the donation or grant. If, on the other hand, we suppose the grantee to be understood, indefinite, or not named with a condition that the land should belong to a city, no reason can be imagined, why a nominal grantee should be interposed, when the grant is to take effect in favor of a city. On the contrary, in my opinion, the words "*ut in civitatem veniret*," establish a condition of reversion to the republic, whether we consider the concession as meant in favor of the conquered enemy, by leaving them in possession, subject to the will of the

state, and *devictis hostibus* in the dative, or to an indefinite grantee under the same condition of reversion, and the same words in the ablative, merely expressive of the fact that the land had been taken from a conquered enemy. De Bréau Neuville, the learned translator of Pothier's Pandects, considers the sense of the passage to be, that lands given back to the conquered enemy on condition of reverting to the republic, enjoy the right of alluvion, and are not limited. Such a translation accords also with the practice of the republic at that remote period. Pothier, in a note to this law and its context, remarks, that when lands were taken from an enemy, the possessors of such lots, when passing under the domination of Rome, were sometimes permitted to retain a part; another part was distributed to the veterans, and another part was sold, deducting that which was left to the ancient proprietor; but every part of those lands thus distributed were measured and bounded, and hence were called *limitati*.

But the most satisfactory authority upon this as well as other points of the Roman land law, is Niebuhr. In speaking of the *limitatis*, this author says: "According to the agrarian institutions no land was held to be marked by boundaries, save what had been divided in conformity to the practice of the state, and to that mode of observing the heavens which was adopted in taking auspices. Every other kind of boundary was regarded by the Romans as indefinite. The subject treated of by the *agrimensores*, is land thus marked out: other land they only mention by way of contrast. Every field which the republic separated from the common domain, was marked out by boundaries; no separation could take place without such a demarkation; and whenever there were any traces of the latter, although particular estates within the region subjected to it might still be a part of the domain, it was yet a certain proof that such a separation had taken place. On the other hand, every municipal as well as every foreign region was held to be without boundaries (*arcifinius*), or merely limited by natural or arbitrary landmarks." "The land which was regularly limited and that which was indeterminate in form along with all the other characteristics of quiritary property, had both of them that of being free from direct taxes, but their value was registered in the census and tribute was levied accordingly. In other respects the limited fields had certain legal peculiarities, concerning which, scarcely any other express statement is preserved, than that they had no right to alluvial land, the determinateness of their size being

the condition of their existence:" 2 History of Rome, appendix 1, by Niebuhr.

The same author further demonstrates that the *limites* which separated these *agri limitati* were not imaginary lines and stakes or landmarks, but spaces of different widths, according to the size of the squares, left forever open and public as highways. They were marked out according to a system, of which the author gives the general outlines in the following words: "The principle of the Roman *limitatio* was to draw lines towards the four quarters of the heavens, parallel and crosswise, in order to effect a uniform division of the lots of land which were transferred from the public domain to private property, and to fix immutable boundaries for them. Hence these boundaries (the *limites*) were marked by a slip of land left for the purpose, untouched by cultivation, as balks or ways; as their extremities were by a row of stones inscribed with numerals:" Id. Such appears to have been the ancient law, not as introduced, or first established, but rather confirmed at a later period by a constitution of Antoninus Pius; for Trebatius, whose opinion is given, was himself a contemporary of Cicero.

There is further passage in Niebuhr, which tends to illustrate the clause "ut in civitatem veniret," which I can not forbear to quote: "There was," says he, "a by-class in the Roman system, when the republic restored a conquered territory to its old inhabitants, subject to the payment of a tithe or some similar tax; this, as long as the precarious possession lasted, was like any other impost, but the republic had the right of claiming the land and turning out the possessors." After the most attentive consideration of this part of the case, it appears to me there is nothing in the Roman law which provided that the right of alluvion was restricted to land or portions of land, bearing particular names or having particular localities, but the right depended altogether upon the question whether the tract had fixed and invariable limits or a natural boundary on one side at least, liable to be affected by a watercourse—no matter whether it bore the name of *ager*, *prædium*, or *fundus*, nor do I find that cities formed any exception to the general rule.

But the counsel for the plaintiffs endeavor to fortify their position by the aid of law 26, tit. 28, Partidas, 3. It is in the following words: "Crecen los rios á las vegas de manera que tuellen e menguan a algunos en las heredades que han en las riberas dellos e dan, e crecen a los otros que las han de la otra parte. E porende decimos, que todo quanto los rios tuellen

á los homes poco á poco, de manera que non pueden entender la cantidad della porque no lo llevan ayuntadamente, quo lo gafian los señores de aquellas heredades, á quien lo ayuntan, e los otros a quien lo tuellen non han en ello que ver. Mas quando acaeciesse, que el rio llevase de una heredad ayuntadamente, asi como alguna parte della con sus arboles, ó sin ellos, lo que asi llevase non gafian el señorío dello aquellos á cuya heredad se ayunta; fueras ende, si estuviesse y por tanto tiempo que raigasen los arboles en las heredades de aquellos á quien se ayuntasen; ca estonce ganaria el señorío dellos el dueño de la heredad do raigasen, pero seria tenudo de dar al otro el mercoo cabo que recibio porende segun el aluedrio de homes buenos, et sabidores de lauores de tierra." This law is nearly a paraphrase of the Roman law *præterea* and the following, in which the words *ager*, *fundus*, and *prædium* are used without distinction. The word *heredad* is used in the Spanish text to express the riparian property or land entitled to alluvion, and the counsel contends it must bear the same narrow meaning which they give to *ager*, to wit, a field without a house. *Heredad*, in Spanish, I understand to mean a landed estate, and the text might well be translated by using that English word corresponding to the French word *heritage*. Thus the word conveys the same idea expressed in the original law of the digest by the words *ager*, *fundus*, and *prædium*. I say the original, because the wisdom of Alphonso was after all, in a great measure, but reflected light, whose source was the Roman law, and which was sometimes not a little refracted by passing through a Gothic medium.

The plaintiffs next invoke the ninth law of the same title of 3 Partidas, as giving in express terms to towns and cities the alluvion which is formed in front of cities. The law is as follows: "Apartadamente son del comun de cada una ciudad ó villa, las fuentes e las plazas o fazen las ferias é los mercados á los lagares ó se ayuntan á consijo é los arenales que son en las riberas do los rios e los otros exidos e las carreras á corren los caballos, e los montes e las ochesas e todos los otros lagares semejantes d'estos, que son establecidos é otorzados para pro communal de cada ciudad," etc. The counsel for the plaintiffs confidently assert that this law is clear and explicit in its terms and decisive of this controversy. The word *arenales* they contend means alluvion, and in this they are in some measure countenanced by what fell from this court *arguendo* in the case of *Packwood v. Walden*, 7 Mart. (N. S.) 90. But does the word *arenales* necessarily mean alluvion? Certainly not, nor can I

see any good reason for considering it as used in that sense in this law. None of the definitions of *arenal* to which our attention has been called in various dictionaries, conveys any such idea as alluvion, that is to say that portion of soil which is insensibly (*poco á poco* in the language of the Partidas) added to and becomes a part of land bordering upon a watercourse; and the only comment of Gregorio Lopez upon the word is a *quære*, "quid de fluminibus?" as if he considered the *arenales* "en las riberas do los rios," as forming a part of the bank itself of the river, and consequently its use already belonging to the public by a previous law of the Partidas and now given to towns in front of which they exist, and he suggests the inquiry whether the use of the rivers also be given to the city as well as the bank.

If it had been the intention of the law-giver to create an exception to the general rule, as recognized in the Partidas, that the alluvion belongs to the owner of the riparian estate or *heredad*, such an exception would naturally have found its place in immediate connection with the general law. Again, why treat of the accessory, without any allusion to the principal? I am rather inclined to think it means only the sandy beach common on shallow rivers, which are anything rather than alluvion formations, and which the inhabitants of cities or towns are authorized to use in common for their domestic or perhaps agricultural purposes, or for public promenades, as the *arenal* of Murcia on the river Segura: Mrs. Cushing's Letters, vol. 2, 342. Be that as it may, it appears to me clear, that all the objects enumerated in the law are connected together and are referred to by the words *establecidos y ortogados*; and if the threshing and grazing grounds and other conveniences mentioned in the law, rest upon a grant to the town, the *arenales* are in the same category, and according to my understanding of the law, it is only an enumeration of those things which are usually given or reserved by the sovereign for the use of towns or cities laid out by royal authority, or which they hold by usage or by concession. In that sense substantially, Gregorio Lopez appears to have understood it. "Præterea quod hic dicatur (que son establecidos) non intelligitur, quod a jure sunt statuti pro civibus; quia civitati vel castro de jure nihil corporale est deputatum, quod sit de ejus pertinencia; nisi quatenus a lege aut consuetudine aut hominum dispositione riperiatu concessum:" Note 6.

But the counsel for the municipality contends that the corporation is in a certain sense riparian proprietor, and therefore

entitled to the increase by alluvion on the front. I can not do justice to this part of the argument without quoting the language of the senior counsel, in which he develops his views on this point. "To any person," says the counsel, "who has studied the civil law of Louisiana and knows the source from whence this text is drawn (art. 501, La. code) as well as the legal acceptionation of the term '*fonds riverain*' (riparious estate), this text is sufficient to form a decision on the conflicting claims of the city and private individuals—owners of lots which are only portions of the estate (*fonds*) upon which the city is founded (*fondse*). He will entertain no doubt that the city and not the owners of these lots is the riparian proprietor:" Page 121. "To build a city," continues the counsel, "town, or village, it is necessary, I conceive, to have first the ground (*fonds*). This (the *fundus*) being had, the town is built upon it. Thus built the town becomes inhabited, and the inhabitants, for the purpose of ingress and egress to and from their houses, etc., and for access to the river upon the borders of which it is situated, for returning therefrom, and for that of traveling over the whole front of the town, if their business requires it, have streets, roads, issues, and avenues, which are no more than parts of the ground, foundation (*fonds*) upon which the town is seated. What is the nature of this property (*fonds*) now? Is it not an urban property? To whom does it belong? Necessarily to the community called a city; to that aggregation of persons who inhabit it. Each of them is proprietor of the lot on which his house is situated, and all possess in common the streets, roads, issues, and avenues, to the use of which every stranger, whose affairs lead him to the town, is in like manner entitled."

He then supposes the prince or the individual who should have founded a city would no longer be regarded as proprietor, and could no more sell the soil upon which the city is built than he could the inhabitants; that he no longer remains master of the ground (*fonds*) upon which the town is built. "We must therefore conclude," says the counsel, "that the ground (*fonds*) which was rural and by its conversion into a city has become urban, no longer does or can belong to its ancient master; that it is and can only be the property of the public—of that aggregation of inhabitants, who by the fact alone of the roads, streets, issues, and avenues being destined to their common use form one community."

It is not easy to conceive how the city in the case thus sup-

posed, in its corporate capacity, becomes proprietor of the port in such a sense as to profit by the alluvion. Take the square of the city, for example, which was laid out by the sovereign. The original plan exhibits a front row of houses—next, a vacant space marked *quai*, then the levee and the river. The front lots belong to individuals, and are bounded in front by a *locus publicus*, the *quai*. In what sense is the corporation a front proprietor, even admitting that the owners of the lots fronting the *quai* are not so? I admit that if a batture should be formed in front of the square of the city, it would be an addition to a *locus publicus*, but that does not prove what is contended for, because the city is not proprietor of the *locus publicus*, but only administrator. It belongs as much to a citizen of Ohio as to a citizen of New Orleans. It is a place left open for the convenience of commerce, and for the use of the whole world—a thing *hors de commerce*. But so far as the case supposed is meant to apply to the *locus in quo*, it assumes as true what is yet to be shown, to wit: that the lots in front are not bounded by the river, that they are not liable to abrasion by the river to the loss of the owners; and that the proprietors would not be bound to give a new levee or a new road, in the event of the existing one being carried away. These are questions which we are to examine in this case, and therefore we can not begin by assuming that the corporation is the riparian proprietor. It is certain that the Jesuits' plantation was originally entitled to the alluvion, and I am now only arguing what change was produced by the mere incorporation of the city in 1805. The question of dedication yet remains to be investigated—for the present it is enough to say that in my opinion the change of the name of the property from rural to urban, by the mere act of incorporation, neither made the city a front proprietor in the sense contended for by the plaintiffs, so as to enable it to acquire *jure alluvionis*, nor did it *per se* deprive the front lots into which the property was subdivided (provided they fronted on the river) of the right of such accretion.

The counsel for the plaintiffs endeavor to fortify the claim of the city to the alluvion by showing that the charge of keeping up the levee is borne by the whole city and not by the front proprietors, and that, therefore, the former ought to enjoy all the advantages resulting from the situation of the land—upon the maxim, "*qui sentit onus, sentire debet et commodum*." That this axiom of equity lies at the foundation of the right of alluvion may be true—it is but just that the risk and loss resulting from the situation of the land should be compensated by the chances

of increase by alluvion. But the *onus* or burden spoken of, is natural, not civil. It is a risk arising from the exposed situation of the land, not the expense or trouble of making embankments to save the land or adjacent tracts from inundation. The right of alluvion exists on streams which do not periodically overflow, as well as others which do, and those police regulations which relate to the making and keeping up of levees have nothing to do, in my opinion, with the question of alluvion.

The arguments of the counsel drawn from the supposed inconvenience of having a port or any part of its bank owned by individuals, and the danger of the public being excluded from the use of it to the great detriment of commerce, would be entitled to serious consideration, if it were not true at the same time, that the public, through the agency of the corporation, has the sole use of the levee and of the bank of the river. That the front proprietors can not extend the levee without the consent of the corporation, and that the city authorities have a right to make all improvements for rendering the whole most useful to the public and favorable to commerce. So far as it concerns the public convenience it seems to be of little importance whether the future increase of the batture shall be decided to belong to the public or to the front proprietors, so long as the municipal authorities alone have the entire control of everything on the outside of the levee and have a right to establish wharves and other conveniences which commerce may require. In most of the seaports of the union it is believed the wharves are private property. Here they will be public, whoever may be considered the owner of the bank of the river, subject to the public use. The Louisiana code is explicit on this point: "The use of the banks of navigable rivers or streams is public, etc., nevertheless the property of the river banks belongs to those who possess the adjacent lands." "On the borders of the Mississippi where there are levees, the levees shall form the banks:" Arts. 446, 448.

It is not pretended that the question which this part of the case presents, has ever been directly adjudicated upon by this court; but it is supposed by the plaintiffs' counsel, as well as the parish judge, that the court has on more than one occasion given a strong intimation, that in their opinion, the alluvion formed since 1805, belonged to the city in virtue of the act of incorporation, and especially in the case of *Cochran v. Fort et al.*, 7 Mart. (N. S.) 622. In that case the plaintiff claimed a city lot fronting on the river, and the alluvion which had formed upon it since his purchase. The question presented was mainly one of fact, to

wit, whether the batture in front of the lot was or was not at the date of the purchase susceptible of private ownership. If so, then it could not be presumed that the vendor of the plaintiff intended to sell it, and the only principle settled in that case was, that the sale of a lot, front to the river, according to a plan which shows the front line to be within the levee, does not carry with it alluvion, provided, at the time of the sale, a batture was formed of sufficient height and magnitude to be susceptible of private ownership. The converse of the proposition, it would seem, ought to be tried also, to wit, that the sale of a city lot fronting on the river, would carry the alluvion, which had formed since the sale. The only difficulty in the case was to ascertain the mere matter of fact, to wit, did the batture in front exist or not at the time of the sale? The court decided in the affirmative, and consequently the plaintiff failed in his action. After deciding the matter of fact decisive of the case, to wit, that in February, 1803, a batture did exist which, with a five-foot levee, might have been used as private property, the judge, who acted as the organ of the court, made the remark upon which so much stress has been laid, to wit: "Supposing this view of the subject incorrect, and that we were to conclude with the plaintiffs that no batture susceptible of ownership existed in February, 1803, their case would not be much stronger. The faubourg was incorporated two years after. To enable them, therefore, to recover in this action, they must show a batture created between the day of their purchase and the date of the act of incorporation, which was susceptible of ownership; for if the alluvion was formed afterwards, it became the property of the city, and not of the front proprietors." Certainly the decision of that case did not require such a remark. It was purely speculative, and although it may perhaps express the opinion of that able judge at the time, yet it does not appear to have been a point discussed during the argument, nor at all material in the case. The question now presents itself directly before us between the city and the owners of front lots in relation to alluvion, formed since the act of incorporation, and I am of opinion that the mere act of incorporation did not change the character of the property, and gives no new title to the city. On this point, I believe, we are unanimous.

The words used by me, as the organ of the court, in the case of *Municipality No. 1 v. Municipality No. 2*, 12 La. 49, have been also alluded to as indicating a strong opinion the other way. The expressions were: "The pretensions of the defend-

ants as set up in their answer to the exclusive ownership of the property in question, and those of the plaintiffs, etc., to take one hundred thousand cubic yards of sand from the batture *ad libitum*, etc., are, in our opinion, equally unfounded and preposterous." In that case there was an express dedication to public uses of the alluvion in front of the suburb St. Mary by a formal contract between the city and the front proprietors, and the act of 1836 refers to and sanctions that compromise; and expressly provides that "the municipality of the upper section of the city of New Orleans shall not in any manner obstruct or impede the inhabitants of any portion of the city, in the free use and enjoyment of any of their rights on the batture." With such a legislative injunction, how could the municipality with any propriety or consistency pretend to be the exclusive owners of a *locus publicus*, which it was their duty to administer according to its destination? But that case and the present have not the most remote analogy to each other.

2. I now enter upon the second branch of this inquiry, to wit, whether the laying out of the faubourg, as shown by the plans, and disposing of lots in conformity thereto, or any other acts of Madame Delord, or her successors, taken in connection with the various ordinances of the city council, furnish sufficient legal evidence of an intention on her or their part to dedicate the property in question to public uses, so as to constitute a *locus publicus*. The petition alleges, that, by reason of the incorporation with the said city, and the laying out and dividing the land, of which the faubourg is composed, into town lots, streets, etc., as a part of said city, the title to all of the said batture or alluvion, then so imperfectly formed, or thereafter to be formed, became by law vested in the corporation of said city, for public uses. It is not distinctly alleged, that there ever was a dedication to public uses, in a legal sense of the word, resting essentially upon the express will of the dedicator, and assented to by the public, evidenced by the public use of it, according to the dedication. But the idea is, if I understand it, that the annexation to the city successively of the different faubourgs, formed but a continuation of the square of the city, and imprinted upon the land in front of the street or road nearest the levee, the same character which the corresponding part of the squares of the city possesses, that of a *quai*. This system is developed with ingenuity and learning, in a pamphlet which has been furnished us as a part of the argument in the case, but the author's name is unknown to us. He considers the *quai*,

marked upon the original plan of the city, as belonging to the city, and not as a *locus publicus*. It is of no consequence in the present case, whether the original *quai*, as designated on the plan made by the French authorities of Louisiana, be regarded in that light as granted to the city, or as a public place. The question is, admitting the old city to be, in that sense of the word, the riparian proprietor, and entitled to any alluvion which might be formed in front of it, whether it results from the plans of the different faubourgs, that all the land between the front row of houses and the levee partook of the same character with that in front of the old city, and that the city was, as relates to the land in front of the faubourgs, also entitled to the alluvial increase; or, in other words, that there was a continuation of the *quai* through the different incorporated faubourgs. The author, above alluded to, treats the old city as the nucleus, around which the faubourgs have gradually clustered, and stand in relation to it as children towards a parent, or perhaps more properly, as partners and associates.

It seems to me clear, that the right to alluvion in front of each faubourg must stand upon its own peculiar grounds, that there is not necessarily any connection between them. The square of the city was laid out and founded by the sovereign. The faubourgs were laid out by the proprietors of different estates in the vicinity, each having a right to alluvion, and the question, what was the condition of the front afterwards, would depend not upon a general conformity of the streets and avenues to those of the square of the city, but upon the disposition made of it by the former proprietor. The French authorities of Louisiana indicated an intention to devote to public uses, to consecrate as a *locus publicus*, all the vacant space between the first row of houses and the river, by writing the word *quai* upon various parts of the plan, and by leaving it open for public use. If, in laying out the faubourgs, the ancient proprietors of those riparian estates did the same thing, or what was equivalent, then there is no doubt it amounted to a dedication, if accepted by the public. The present inquiry is confined to the Faubourg Delord, and to the plan of it made by Madame Delord; for with respect to the Faubourg St. Mary, it was long since settled, that the alluvion belonged to the front proprietors, and it has subsequently been dedicated to public uses by a compromise between them and the city.

It may not be amiss, however, to refer to what the court said

in the case of *Morgan v. Livingston*,¹ with respect to the effect of a plan of a faubourg made by Gravier, and the condition of the property after its division into lots. "On the morning of the day," says the court, "on which Bertrand Gravier sent for a surveyor, to make a plan of his plantation into lots and streets, the land covered by it was rural property, burdened with riparian duties in his hands, and when the plan was finished by the division into lots and streets, no alteration was wrought in these burdens. When nine months after, Poeyfarré purchased the trapezium, he purchased a rural estate, burdened with riparian duties, having the portion of the bank of the river before it as an accessory. The sale discharged the vendor from, and imposed on the vendee, the duties of repairing the road and levee along the land conveyed. If any part of this portion of the road had been found out of repair, the syndic of the district would have compelled the vendee to repair it, without the least inquiry into the circumstance, whether his deed bounded him on the road, or on the river; if he was really the owner of the land, and separated from the river by the road only. The banks of the river opposite to the trapezium, passing to the vendee *cum onere*, must have passed *cum commodo*. "Had every lot in the faubourg been sold, the liability of the land which they covered, would have continued the same," etc.

The "member of the Louisiana bar," whose argument has been mentioned, undertakes to maintain two propositions: First, that the city of New Orleans acquired, at the time of the union of the suburb Delord with the city, all the riparian rights which Madame Delord possessed by virtue of a valid contract, and for a valuable consideration; and secondly, that Madame Delord has never disposed of any portion of her riparian rights in favor of the defendants. The record does not furnish us with any evidence of any such express contract, as is supposed. In 1805, the plantation which afterwards became the faubourg Delord, formed an integral part of the city by the act of incorporation. After it was laid out as a faubourg, it remained for many years what was termed one of the unincorporated boroughs or suburbs of the city; that is to say, not yet entitled to participate with the square of the city in the advantage of being lighted and guarded at the common expense. This last step was not taken until 1831, when, by an ordinance of the city council, a part of the faubourgs Delord, Saulet, and Lacourse, between the upper line of the faubourg St. Mary and

the center of Lacourse street, was incorporated, and required to pay the same taxes, and authorized to enjoy the same rights and privileges as the inhabitants of the square of the city: Ordinance of April 8, 1831, City Laws, 63. Up to that period, I have seen no sanction by the city authorities of the plan of a faubourg adopted by Madame Delord, much less any contract by which she abandoned the front of her land to the city. Indeed, the uniform legislation of the city council, from that time until the inception of this suit, repels such an idea. In 1817, an ordinance was passed concerning the unincorporated boroughs and suburbs within the city of New Orleans, which provided, among other things, that "the levees adjoining the estates bordering on the river, situate in front of unincorporated boroughs or suburbs, which have hitherto been kept in repair at the charge of the proprietors, whose lands are bounded by the river, whether by a particular clause stipulated between the vendor and the purchaser, or of an obligation anterior to the settlement of said boroughs or suburbs, shall continue to be kept in repair at the expense of the said proprietors, in the manner prescribed by the ordinance concerning highways, bridges, and levees within the liberties of New Orleans." The ordinance last referred to was passed in 1815, and requires the front proprietors to keep up the levee. The ordinance of 1830, the execution of which led to the suit between the city and Henderson and others, treated those who held lots under Madame Delord as front proprietors. It directed a new levee to be laid off by the city surveyor, commencing at the lower line of the faubourg Delord, and running parallel with New Levee street to Roffignac street, and then to the upper line of Mr. Byrne's property. It directs the proprietors to be notified, and requires them to complete and deliver said levee on the first day of November; and it was made the duty of the mayor to notify the front proprietors of lots in the faubourgs Delord and Saulet; and it further directs the work to be done at their expense in case of contravention, besides a penalty of one hundred dollars. A new road and levee were directed to be laid off in advance of the former ones; and the questions which arose, in the case of *Henderson et al. v. The Mayor, Aldermen, and Inhabitants*,¹ presupposed the plaintiffs to be, in point of fact, riparian proprietors, for they related to the obligation of the latter to furnish a new road, and to make and keep up the new levee.

But if on the part of the city authorities every official act

1. 3 La. 563, and 5 Id. 416.

which has been brought to our notice, tends to show that the city did not understand there was a dedication, resulting from Madame Delord's plan of a faubourg, which constituted the city the riparian owner, as is now pretended, how do the subsequent acts of Madame Delord and her successors accord with the theory of a dedication to public use? On the twenty-sixth of May, 1806, she sells to Larche three lots on the batture, according to the plan of Lafon, of the twenty-first of March of the same year, the purchaser taking upon himself the burden of making and keeping in repair the road and levee in front of said lots. On the sixth of June, 1807, she sells to Armand Duplantier her plantation of about seven arpents, fronting partly on the river and partly on the great route of Tchoupitoulas, and among other title papers handed over, appears a plan of the plantation by Lafon, of the sixth of February, 1806. None of the plans in the record contain any indication of the front having been dedicated to public use, and her contract with Larche and with Duplantier shows that she did not so understand it. She continued to exercise acts of ownership as a riparian proprietor, not only without opposition on the part of the city, but the last ordinance of 1830, by the city authorities, acting as a police jury and laying out a new road and levee, imposes upon her successors, as riparian proprietors, the burden of keeping up the levee along their front.

Lafon's plan of the sixth of February, 1806, is now before me. It exhibits the side lines of the plantation of Madame Delord, which separates it below from the faubourg St. Mary, and above from that of Saulet, as running diagonally down to the water's edge. The front lots are represented as bounded on New Levee street, and the levee is marked along the side of the street, and between it and the river, at a distance of about fifteen toises from it. There is no mark indicating any intention on the part of Madame Delord to give up her claim or title to the land forming the levee and on the outside of it. Since the date of that plan, the land upon which the cotton-press stands, has been formed, and the levee and public road, laid out by order of the city council in 1831, are about two hundred feet outside of New Levee street; and all the land between New Levee street and the new road and levee belongs, according to the judgment rendered in this case, to the front proprietors. The intervention of a public road between the front tract and the river does not prevent accretion by alluvion, because the road and the levee themselves belong to the front pro-

priestors, subject to the public use: 6 Mart. 230;¹ Sirey for 1822, pt. 2, p. 191.

It is true the public has always possessed and used the levee and the ground between it and the water's edge; and if the city authorities, under whose administration such a right has been enjoyed, had no other title but that which would result from the presumed consent of the front proprietors, such enjoyment in the presence of the latter might tend to show an acceptance on the part of the public of a dedication to public uses. But the law itself gives to the public a right to such enjoyment independently of the consent of the front proprietor, and such use is not legally inconsistent with the ownership by the riparian proprietor. Nothing therefore can be inferred from the public use of the bank of the river and the land on the outside of the levee, and the batture as fast as it forms. The city authorities have the exclusive control of the levee and the banks of the river as a part of the port of New Orleans. The principles which govern in cases of dedication to public uses are considered as well settled. They were recognized by the supreme court of the United States in the case of *The City of Cincinnati v. White's Lessee*, 6 Pet. 431, and were assumed by the present senior judge of this court as the basis of his opinion in the case of *De Armas et al. v. The City of New Orleans*, 5 La. 148. "The law applies to it" (a dedication), says the court, "those rules adapted to the nature and circumstances of the case, and to carry into execution the intention and object of the grantor and to secure to the public the benefit held out and expected to be derived from and enjoyed by the dedication. That there was no particular form or ceremony necessary in the dedication of land to public uses, and that all that was required was the assent of the owner of the land, and the fact of its being used for the public purposes intended by the dedication." Tested by these principles I can not find, in the case now before us, any evidence of an intention on the part of Madame Delord or her successors, to dedicate the front of her or their land to the public use.

But the principle that the intervention of a public road does not cut off the right of alluvion, or in other words, that a tract of land separated from the river by a public road is still considered as fronting on the river, and a riparian estate, has been contested in this case on the ground that the land over which the road runs was paid for by the city in pursuance of the judgment of this court in the case of *Henderson et al. v. The City*,

1. *Morgan v. Livingston*.

and that consequently the city became the absolute proprietor of the road and levee, and front owner. Even supposing this to be true, which I am not disposed to admit, and that the road opened under the ordinance of 1831, became by the judgment of the court the absolute and irrevocable property of the city, still it is nothing more than a public road, *via publica*. This court in the case of *Morgan v. Livingston*,¹ decided in the most explicit manner this question. The language of the court in that case leaves no doubt upon that point, supported as the principle is by unquestionable authority. The very point now urged was considered and overruled. The court says:

“ The bank passes with the field, even when there is an intervening public road: *Ripa cedit fundo, l. Riparum, ff. rer. divis. Inst. eod. tit. Dicit verum si via est media. Ripæ, respectu proprietatis sunt illorum, quorum prædiis hærent, sed quid si via esset in medio, inter flumen et agrum vel domum? Responde idem ut Ripæ sunt eorum. Cæpola, etc.* If there be a public road between a field and the river, still that which is made by alluvion accrues to the field. *Si meum inter agrum et fluvium inter jaceat publica via tamen meum fieri quod alluvio adjicit. Grotius, etc. Gronovii, nota 68.* But the defendant's counsel urges that this must be understood of a private road, one of which the soil belongs to the owner of the field, and is burdened with a right of way, and he refers us to the law, *Atticus, ff. 41, 1, 38*, and to Grotius, who holds there is no principle of natural law which justifies the position that the owners of estates, separated by a public road from the river, have a right to alluvion, and admits that the field has the alluvion, if it be a private one, which owes a road—*qui viam debeat*: Grotius, etc.—so that the soil of the road be the property of the riparian owner. The expression used by the writers whom Grotius condemns, is *via publica*, a public road. A public road is that of which even the soil is public; it is not in a public road as in a private road, the soil of which does not belong to the public, while we have only the right of walking and driving over it; the soil of a public road is public. *Viam publicam eam dicimus cujus etiam solum publicum est, non sicuti in privata via ita esse in publica accipimus; viæ privatæ solum alienum est. Jus tantum eundi et agendi nobis competit; viæ autem publicæ, solum publicum est: ff. 43, 8, 2, sec. 21.* We conclude that in the present case the intervention of the public road between the trapezium and the river, can not be con-

sidered as a proof of the intention of the parties to give the land conveyed another boundary than the river."

I have copied this part of the opinion of the court in the case of *Morgan v. Livingston*, not only because it is the language of the court, expressing its deliberate judgment upon a leading point in the case, which point is again made in the case now before us, but because it was written by the present senior judge, then the organ of the court, in pronouncing its decision. There is a striking resemblance between this case and that above alluded to, decided by the Cour Royale of Lyon, and reported in *Sirey* for 1829, 2d part. In that case the commune of Roques insisted that the property of the defendants was separated from the garonne by a public road (*chemin communal*), and consequently the alluvial increase could not attach to it, although it might be otherwise if separated only by the towpath (*chemin de halage*), because the latter is but a servitude imposed upon the riparian property. But the court held otherwise, and relying upon the same authorities from the Roman digest and institutes which are quoted in the case of *Morgan v. Livingston*, decided that a public road does not legally interrupt the adhesion between the front lands and the river, which it separates, because the road makes a part of the land itself, if not *quoad proprietatem*, at least *quoad commodum et incommodum*.

This argument is based upon the supposition that the new road in front of the cotton-press, laid out under the ordinance of 1831, belongs to the municipality in full property, or is a public road, and has been purchased from the front proprietors in pursuance of the judgment in the case of *Henderson et al. v. The City*. But there is no evidence in the record that such is the case. That judgment proceeds upon the ground that the land over which the new road was laid out belonged to the front proprietors. The city was enjoined from proceeding to open the road without paying an indemnity to the front proprietors, and the injunction was maintained by the final judgment until the city should pay that indemnity. Nothing further appears to have been done. No expropriation has ever taken place, either according to the mode pointed out by the code, or the act of 1832, relative to the opening of streets. The judgment of the district court, which was affirmed, was, "that the injunction be continued in force as relates to the making of the road, until the defendants shall indemnify the plaintiffs for the damages which the establishment of said road may cause them respectively," etc. The court decided little more than the abstract

question of right, to wit, that the front proprietors, or those under whom they hold, having already given one road, according to the condition, express or implied, of the original grant, were not bound to furnish another without indemnity. Surely that judgment did not *per se* divest them of their title to the land over which the road passes. Until the amount of indemnity shall have been assessed, there is no price of the thing to be forcibly sold, and the act of 1832 makes the payment of the indemnity or tender and refusal a condition precedent to the divesting of the title. Until then the title of the ancient proprietors is unimpaired.

To conclude: Upon a view of the whole matter which this case presents, I am of opinion that the act of incorporation of 1805 did not and could not legally affect the right to alluvion, which belonged to the original tract of land that afterwards composed the faubourgs Saulet and Delord. That each part of it fronting on the river was still entitled to the right of accretion, notwithstanding the act of incorporation. That the laying out of the faubourg in 1806, according to the plan in the record, viewed in connection with other acts of Madame Delord and of the city council, do not furnish legal evidence of a dedication to public uses, and that the purchasers of front lots still remained riparian owners. That urban property fronting on a water-course is entitled to alluvion as well as rural estates; and that cities can acquire *jure alluvionis* only in virtue of a title which would constitute them front proprietors. That the defendants must be considered as owning down to the road last laid out, and that the intervention of the road does not in law prevent their being regarded as front proprietors, and entitled to any alluvion which now exists or may hereafter be formed between the levee and the water, subject to the public use under the administration of the municipal authorities.

A majority of the court concurring in these views, it is ordered, adjudged, and decreed, that the judgment of the parish court be annulled, avoided, and reversed, and that ours be for the defendants, with costs in both courts; reserving, however, to the public the use of the levee; and of all the alluvion which existed at the inception of this suit, or which now exists, or may hereafter be formed between the levee and the river, to be administered exclusively, and its use regulated, according to law, by the city council of the second municipality.

MORPHY, J. The opinion just delivered by Judge Bullard sets forth so fully and satisfactorily the views of the majority of this

court, on the several questions submitted in argument, that I can not believe it necessary for me to do more than to express my entire concurrence in them.

SIMON, J. I have carefully considered the opinion which Judge Bullard has prepared; it expresses so fully my ideas upon the important questions which this case presents, that I deem it sufficient to state that the conclusion to which he has arrived appears to me correct on all the grounds therein assumed; and that I perfectly concur with him in the opinion and judgment which he has just pronounced.

GARLAND, J. Concurring generally in the reasoning of the learned judge who has delivered the opinion of the court, and fully in the judgment, I will give a few of the reasons upon which my judgment is based. It is the unanimous opinion of the court, as I have always understood, that previous to the act of the seventeenth of February, 1805, incorporating the city of New Orleans, the plantation of Madame Delord was a riparian estate, and entitled to the alluvion in front of it. It is also agreed, that that act of the legislature did not, in any manner, affect her title to the property, or interfere with her right to enjoy it. If, therefore, any change has taken place in the title or right of enjoyment, either by her or those who hold under her, it must be in consequence of some act of her or them. What is the act that changes the tenure by which the property is held, or deprives them of that provision of the constitution which says, "nor shall private property be taken for public use, without just compensation?"

In February, 1806, Madame Delord laid out a portion of her plantation into lots, extending the streets that previously existed in the faubourg St. Mary, running parallel with the river and giving them the same names, and laying out new streets at right angles (or nearly so) with them, giving them new names. Tchoupitoulas street was then the public road alongside the levee, which was a servitude on the land, and she in laying out the lots, left it as a street, and between it and the edge of the water on the batture, laid out a range of squares, subdivided into lots, having New Levee street in front, between which and the water's edge, there was left an open space extending along the whole front, on which not a word was written nor is anything said about the use of it, nor to whom it belongs. In the rear of the lots a large space is left in the same manner. The strip in front, which has been much increased by alluvion, is the subject

of controversy. Now did the mere act of laying off the land into lots change her title or right of enjoying it in the mode prescribed by law? I suppose it did not of itself, because if she had the next month destroyed her plan, and again planted cotton or cane on the land, she could have done so, and no one would have any claim to the lots or the streets, or any right to disturb her in the enjoyment of the whole property. Then what deprived her of her right to close up the streets, and deprive the public of the use of them? It was, in my opinion, because she sold the lots, and held out to the purchasers by the plan a right of way, specially mentioned, which they and their successors have a right to use as long as they are proprietors of the property.

What the presiding judge of this court said in the case of *Morgan v. Livingston*, 6 Mart. 236, in relation to Bertrand Gravier, his plan and its effects, has been repeated verbatim in the opinion just read. If that be true, as to Bertrand Gravier and Poeyfarré, and those holding under them, why is it not so in relation to Madame Delord, Larchevêque and Duplantier, and those holding under them? The sale from Madame Delord to Larchevêque is so nearly similar to that of Gravier to Poeyfarré, as to approach identity. A perusal of the whole of this case, will show that the majority of the court are not about to depart as far from the principles, upon which it was decided, as some of those who aided in establishing them. I am not one of those who hold, that the right of alluvion is based exclusively on the principle of being subject to the expense and burden of keeping up roads and levees. The Roman jurists say, it is a mode of acquiring property by natural law, and comes from the maxim, it is "just the advantages of a thing should belong to him, who supports its disadvantages." Therefore, says a French writer, "nothing is more just than that a proprietor, to whom a stream has often borne prejudice, should have, to the exclusion of all others, when it becomes beneficent, a gift, less a present than an exchange:" 4 Nouv. Diction. de Brillou, 278. The learned chief of this court has said, "The right of increase by alluvion is grounded on the maxim of law, which bestows the profit and advantages of a thing upon him who is exposed to suffer its damages and losses:" 6 Mart. 243.¹ Roads and levees have nothing to do with the right to alluvion; it is the liability to lose a portion of the land by the abrasion of the waters, that gives the benefit, and a man is as much entitled to the

1. *Morgan v. Livingston*.

alluvion formed in a river, on the banks of which there is neither road nor levee, as he, who is on a river that has both.

A good deal has been said in argument about urban and rural property. If by this, it is meant that there is a difference between the tenure, by which property is held in a city, from that in the country, I have not been able to see it. I understand something about urban and rural servitudes and uses; but they differ essentially from the titles by which property is held, and I know of no law by which these accessories or burdens can *ipso facto* deprive a person of title.

But it is said that Madame Delord when she left the strip of batture in front of her lots, intended to give it to the public, and that, although she said not a word about it on her plan, yet it is dedicated to public uses. This is a matter of fact, and let us examine it. She does not say, either verbally or in writing, it was her intention to give it. She certainly knew she had a right to the batture in front of her property, as a number of squares were laid out on it, and the levee was not made in front of them until some time after, when it was made at the expense of the front proprietors. Can any one believe, it was her intention to give this batture to the public, when she was daily selling it? In less than ninety days after she made her plan, she sold lots on the batture to Saulet and Larche; in these sales she specifies, they are to keep up the road and levee, and she abandons to each of them all her pretensions to the river (*elle se desiste de toutes pretentions sur le fleuve*). In the sale to Duplantier she is very explicit. The sale is for seven arpents, "*face au fleuve, et l'autre partie a la grande route des Tchoupitoulas*," together with "*tous les droits de propriété qu'elle a et peut avoir sur la dite habitation*." I think, my learned colleague will admit, that when a person has a property that will sell readily at good prices, and is actually selling, it is not a strong presumption of an intention to make a donation to the public.

But it is said, the plan is a sufficient dedication, and the plan of the square of the city is constantly referred to, as if it was similar. If the words quay, port, public square, or anything indicative of an intention to give were on the plan, and the public had used the ground, I should say, it was a sufficient dedication; but there is nothing of the kind shown. The case of *The City of Cincinnati v. The Lessee of White*, 6 Pet. 432, is much relied on, and is said to sustain this dedication. That case is not, in my opinion, understood either as to the facts or the real points decided. It does not appear positively, what words were

used to prove a dedication. My colleague says, none. I think differently. The court says: "A plan was made and approved of by all the proprietors; and, according to it, the ground lying between Front street and the river, was set apart as a common, for the use and benefit of the town forever; reserving only the right of a ferry; and no lots were laid out on the land thus dedicated as a common." The language used by the court proves something was written on the plan, otherwise how could the right to a ferry landing have been reserved? On page 440 the court again says: "In the present case there having been an actual dedication fully proved, a continued assent will be presumed, until a dissent is shown." Full proof, I think, means something more than a blank space on the plan. But the real questions in the case were not, whether the plan did not exhibit a dedication, but whether it must not be proved by a deed in the same form, as was necessary to convey title; and also, if there had been a deed, if the grant was not void, the proprietors not having the legal, but only equitable title to the land; and there being no grantee in existence to accept it, the city not being incorporated when it was laid out. The court held neither a deed nor a grantee was necessary, and said: "No particular form or ceremony is necessary in the dedication of land to public use. All that is required, is the assent of the owner of the land, and the fact of its being used for the purposes intended by the appropriation." I agree most cordially to all this, and if the assent of Madame Delord or those holding under her, was shown, I should conform my judgment to it.

It is said this assent has been shown by the notorious public use of the ground for thirty-five years. Where the evidence of the notorious use for that space of time is to be found I am unable to discover. It is certainly not in the record. For some time after the lots were laid off it is not probable much business was transacted in that quarter; the levee was used there, it is to be supposed, as at other places near the city. More recently, the evidence shows the city did not keep up the road or levee but compelled the front proprietors to do it. The people there were not considered in the incorporated limits of the city until 1831. The record is full of evidence showing that the levee and batture were appropriated to private purposes, covered with sawmills, woodyards, sheds to make shingles under, and shops of various descriptions. Pilié, a witness, says he never saw a place so incumbered, he had great difficulty in passing along, and so indefensible did the corporation in 1830 regard their

pretensions, or so powerless was it to enforce them, that the legislature had to pass a law to enable the mayor to remove the obstructions. The execution of this law gave rise to the suit of *Henderson et al. v. The Mayor, etc.*, 3 La. 568; 5 Id. 416; on the second trial of which case, the corporation admitted in the record, that the plaintiffs were the owners and proprietors of the lots and of the batture also.

The admissions made by the attorney of the corporation in that case, it is now said, are not binding, as he had no right to make them. His want of authority has not been shown to my satisfaction, and I know no reason why the regularly appointed attorney of a corporation can not make admissions as well as the attorneys of individuals, and why they should not be as binding on the principal. Corporations have no higher privileges or rights than citizens unless specially granted, and are especially bound by the acts of their agents, as they can not be bound in any other manner. It is to me rather a curious doctrine that the corporation can constitute itself the champion of the public, to vindicate or assert its rights, and its acts can the next moment be repudiated. If the admissions made were null, why were they not so declared at the time? We are informed the decision of the case was based on them. If so, they were valid, and being valid then, are equally so now, unless shown to have been made in error or fraud. I do not recognize the existence of a tyrant public which no law can bind, that can assert a right to the property of a citizen and deprive him of it by its *ipse dixit* at pleasure, under the plea of necessity or the public good. The doctrine bears the impress of another sphere and has its origin in imperial Rome, or in the benighted days of France and Spain. But if the public is so far above all law, it does not prove its agents and champions are so; and corporations can not by assuming or usurping the exercise of the powers of the sovereign relieve themselves from their proper responsibility. They can not, under the pretext that their creator has been slumbering for years, suddenly arouse him and make him rudely seize upon the property of the citizen in his first waking moments. I concede that if it were shown the admissions were made in gross error and fraud, they would be void; but there must be some stronger evidence of this, than the mere fact that they are prejudicial to the claims of the plaintiff.

It is not denied that if a tract of land owes a road to the public, being one of the servitudes imposed by the grantor, that the alluvion belongs to the proprietor, but, it is said, if the

proprietor of his own accord give a road, or one is taken from him by expropriation, under the acts of the legislature of 1818 relative to roads, and that of 1832 relative to streets in this city, that then he is not entitled to the alluvion that may be formed on the other side of the road. I have sought in vain for any good reason for this distinction. No man is presumed to give without compensation, and when for public purposes private property is appropriated, no more is taken than is necessary for the purpose intended and stated. I should rather hear a good common-sense reason given for such a distinction than the citation of a disputable case from a foreign tribunal. It is further contended that the place in front of this property is a part of the port of the city, and being so, the whole bank of the river is public property. To this it may be replied, it was not a part of the port in 1806, nor was it so until a number of years after, any more than the river is a port at other places. Port, with us, has a definite meaning, and that of New Orleans specific boundaries, and it was not until 1821 that the legislature extended it to the place in controversy. Afterwards congress extended it to the limits of the three municipalities: 3 Moreau's Dig. 259; 9 U. S. L. 593. I am not aware of the law which says, when the legislature extends the port of a city, that the citizens thereby are deprived of their rights to their property. I have no apprehension that the city will be cut off from the river by an increase of the batture, and if there is one mode more effective than another by which such an apprehension is to be realized, it is by placing *hors de commerce*, a large space in its front which could not be disposed of, except by the legislature or congress.

The code specifies the rights, privileges, and uses to which the public are entitled upon the shores and banks of rivers, and in the ports and harbors, and I am disposed to give full effect to them. As long as the public has need of the use of the bank of the river, the levee and batture in front of it for the convenience of the citizens and for commercial purposes, I think it is entitled to such use, and the municipality the right to the administration; the soil remaining in the proprietors and owners of the front lots. Whenever the space shall become so large as not to be wanting for public use, the law provides a mode for extending the levee and putting the owners in possession: La. Code, arts.

I am therefore of opinion that the judgment of the parish court should be reversed so far as stated in the judgment, or-

dered to be recorded, and the rights of the parties must be regulated by it.

Martin, J., dissented. His conclusions may be summed up in his own language as follows: "Upon the whole matter, therefore, I have come to the conclusion: 1. That the founders of a city or faubourg on the banks of a navigable river do, by the plan and the acts of sale of lots in accordance therewith, make a dedication of all the land within the limits of such city or faubourg which is not by the plan reserved for the purposes of lots to be sold; and especially of all such parts of the land of which the public have the useful domain, and which are essential to the prosperity of a city or faubourg so situated, to wit, the streets and bank of the river; and that the attempt on the part of the defendants, assigns of the original founders, to resume a part of the land so dedicated and abandoned, is a violation of the contract rights of the purchasers of lots and of the public, and tends to impair the original contract. 2. That the founders of a seaport city or faubourg, on the banks of a navigable river, do, by the plan of the city or faubourg so founded, intend to create a port, and that the river and the land adjoining the river in front of such city or faubourg, necessary for the purposes of lading and unlading merchandise and of commerce in general, constitute the port, which is *locus publicus*, and that the destination and dedication of land so situated is especially to be presumed, as well from the plan as from the intention to found such city or faubourg, and is clearly evidenced in the present case. 3. That the levee or bank of the river being an accessory to the principal estate, can not be separated from it by any act or intention of parties. 4. That alluvion formed in a port partakes of its nature, and of that of the street immediately along the river is *locus publicus*, *hors de commerce*, and does not belong to the owners of the front or of any other lots in the city. 5. That the corporations of the city having stood by and permitted individuals to expend large sums of money, and make purchases of the property in dispute, and in some measure recognized their rights, the latter have acquired an equitable title thereto and ought not now to be disturbed; but the rights of the public as to what is not in the actual possession of the defendants must not be affected by the judgments which they have obtained."

These conclusions amount to this, that in his opinion the evidence of dedication was sufficient, and that if not, the intervention between an estate and the river of a public road or street, which, if washed away by the encroachment of the river, must be replaced, not by the owner of the adjoining tract, but at the expense of the public, gives the latter a right to the increase by alluvion, because in such a case, they, and not the proprietor of the adjoining tract, are the ones on whom falls the burden of losses rendered possible by the vicinity of the river.

RIGHT TO ALLUVION: See *Hagan v. Campbell*, 33 Am. Dec. 267, and note, in which the subject is discussed at length.

FLEYTAS v. PONTCHARTRAIN R. R. Co.

[18 LOUISIANA, 336.]

CONTRIBUTORY NEGLIGENCE ON THE PART OF A PERSON INJURED by a railroad train bars the right to any action for the injury sustained.

APPEAL from a judgment by which plaintiffs recovered the

value of a slave crushed by a locomotive belonging to defendant. The other facts appear from the opinion.

Roselius, for the plaintiff.

Hoa and Eustis, contra.

By Court, MARTIN, J. The defendants are appellants from a judgment by which the plaintiff has recovered the sum of fifteen hundred dollars, the value of a slave, crushed by one of their locomotive engines, while he was lying across their railroad, asleep, intoxicated, or in a fit of epilepsy or other disease. The testimony does not show that the engineer did not act with due care. He discovered the slave about two minutes before the catastrophe happened; and the chief engineer of the Carrollton railroad has testified that in ordinary circumstances, a locomotive engine with a train of cars, such as were drawn at the time, may be taken up in half a minute. On the other hand, it is not shown that the slave labored under any disease; and therefore if he fell asleep on the road, he was guilty of great neglect; and if he was disabled from taking care of himself by intoxication, his owner can not expect compensation for him: See the case of *Lesseps v. Pontchartrain Railroad Company*, recently decided, 17 La. 361.

The defendant's witnesses were mostly persons who were passengers in the train, and had the best opportunity to give information, as they were eye-witnesses. Those of the plaintiff were not present, but some of them came soon afterwards. The testimony, in our opinion, preponderates in favor of the defendants. In cases like the present, where the accident may be attributed to the fault or neglect of both parties, the plaintiff can not recover. In the case of a collision between two vessels, Lord Tenterden, C. J., says, in summing up the case to the jury: "The question is, whether you think the accident was occasioned by want of care on the part of the crew of the Robert and Ann (the defendant's vessel). If there was want of care on both sides, the plaintiffs can not maintain their action; to enable them to do so, the action must be attributable entirely to the fault of the defendants." 1 Moo. & M. 169;¹ or 22 Eng. Com. L. 280.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided, and reversed; and that ours be for the defendants, with costs in both courts.

CONTRIBUTORY NEGLIGENCE: See *Washburn v. Tracy*, 15 Am. Dec. 661; *Bush v. Brainard*, 13 Id. 513; *Smith v. Smith*, Id. 464; *Hartfield v. Roper*, 34 Id. 273, and cases cited in the note thereto.

1. *Vanderplank v. Miller*; 8. C., 22 Eng. Com. L. 498.

CROCKER v. MONROSE.

[18 LOUISIANA, 583.]

IF A PAWN IS LOST THE PLEDGEE CAN NOT RECOVER ON THE DEBT for which it stood as security, without showing that the loss was in no wise attributable to any want of necessary care and diligence upon his part.

THE opinion states the case.

Elwyn, for the plaintiff.

Sevier, *contra*.

By Court, SMON, J. This suit was instituted on a written instrument subscribed by the defendant's wife, in the following words: "Received, New Orleans, 31st October, 1837, of Elisha Crocker, three hundred and twelve dollars, to be repaid in sixty days from this date, and, as a collateral security for the repayment, I do hereby place into his hands the following articles, viz.: one pair diamond earrings, two diamond rings, one diamond breast-pin, one pair of gold buckles, one pair of gold ear-rings, with breast-pin. Signed, F. Monroe." Plaintiff also represents that the articles therein mentioned were in his house, safely deposited with money and other valuables belonging to him; that said house was, during his absence, totally consumed by fire, and that said fire was not to be ascribed to any fault of his, or of any of his agents, and was the result of inevitable accident. He further states that the money was borrowed by defendant through the agency of his wife, who was authorized by him, and whose acts he has approved; that the sum loaned was applied to the defendant's own purposes, and that said defendant's wife is in the habit of transacting a great part of his business.

The defendant first pleaded the general issue, and further averred, that the jewels were of the value of six hundred dollars; that they were deposited for the repayment of three hundred and twelve dollars, loaned to his wife; that he never authorized his said wife to borrow said money, and give the receipt or obligation annexed to plaintiff's petition. He also alleged, that a long time previous to the institution of this suit, he tendered to the plaintiff, at his domicile, and in the presence of witnesses, the amount of the money loaned, with interest, and demanded the delivery of the jewels, but that plaintiff refused to deliver the same; that he made repeated demands at different periods to the same effect; and notified plaintiff of his readiness to repay at any time the said sum of money, with interest, on his delivering

the jewels, holding said plaintiff responsible for the value of the same, to the amount of six hundred dollars, which he pleads in reconvention. He prays judgment accordingly. There was judgment below against plaintiff, and in favor of the defendant, with costs of suit; from which judgment the plaintiff appealed.

The only evidence adduced in this case, except the production of the receipt sued on, is relative to the destruction by fire of the defendant's jewels, and it is very loose and unsatisfactory. One of the witnesses shows, that plaintiff's house was burned down; that the fire was sudden and rapid; and that some pieces of metal which were white and hard, were picked up among the ruins. The other witness proves, that he was living at plaintiff's house at the time of the fire; that he saw a box in the house containing jewels, which box was put on the top of an armoir; that plaintiff took down the box, took out some specie, and put some back again in it; that a day or two before going away, the plaintiff took the jewels out of the box, and put them back again, and then put the box on the top of the armoir; that the box was burned with the fire; that he saw the pieces after the fire, found some metal melted up which was supposed to be the jewels, and that he has every reason to believe that said jewels were in the box when the house burned up. With this unsatisfactory evidence, it seems to us that this case is not in such a condition as so enable us to decide upon the rights or liabilities of the parties, and that neither of them is entitled to any judgment at our hands. The plaintiff has adduced no proof of the authorization of the wife by the defendant, nor has he sufficiently established the other allegations contained in his petition, upon which he seeks to make the defendant liable, and to free himself from the obligation of restoring the pledge.

It is true, that according to the article 3184 of the Louisiana code, the pledgee is only answerable for the loss or decay of the pledge which may happen through his fault; and that under the article 1902, his principal obligation is to take all the care of the thing pledged that could be expected from a prudent administrator; this rule being subject, however, to further restrictions or modifications. But here the evidence does not satisfy us, that the very jewels in question were destroyed by the fire of the plaintiff's house during his absence, as by him alleged; that they are not in any manner identified; and if they were the same, it is not shown that any degree of care and diligence has been used to save and preserve them. If, with regard to the

pledgor, he can not retake the objects pawned without paying the whole amount of the debt in principal and interest; on the part of the pledgee, the restoration of the pledge is a condition without which a recovery can not be had; they must take place simultaneously; and in order to be discharged from this obligation, the pledgee must show not only that the thing pledged is lost or destroyed, but also that he unsuccessfully used all necessary care and diligence to preserve it.

This makes it unnecessary to inquire into the legal effect of the offer made by the defendant to pay the amount of the loan, as even supposing that his (said defendant's) allegations could be considered as a sufficient ratification of the act of his wife, the plaintiff, from the insufficiency of his evidence, would not be entitled to a judgment.

As to the reconventional demand set up by the defendant, there is no proof whatever of the value of the jewels; and were we ready to say that the objects pawned belonged to him, and that he has a right of recovering them, or their value, we should be without any criterion upon which our judgment could be based. With this view of the case, we think that the judgment appealed from, so far as it allows nothing to either of the parties, is correct, but that it ought to have been limited to a mere judgment of nonsuit.

It is therefore ordered, adjudged, and decreed that the judgment of the district court be affirmed, with costs, and that the same be so modified as to have only the effect of a nonsuit.

RUSSELL v. FAVIER.

[18 LOUISIANA, 585.]

THINGS OF PERSONAL PROPERTY CAN NOT BY A SALE thereof, though to a purchaser in good faith, pass the title.

THE opinion states the case.

Peyton, for the plaintiff.

Hoa and Benjamin, *contra*.

By Court, GARLAND, J. The plaintiff claims a negro girl as his property, which he alleges is in the possession of the defendant, Madame Favier, who sets up title to her. The latter denies the plaintiff has any right to the slave, and further says she purchased her in good faith for a valuable consideration of Veill, who warranted the title, and he was cited to defend it.

He answers, that he purchased the slave for a valuable consideration and in good faith; he denies defendant's title, and says, if he ever had any, it has been divested. The evidence establishes conclusively, that the girl Lydia was born on the plantation of the plaintiff, in the state of Virginia, of a female slave that belonged to him. In the latter part of the year 1836, he brought this girl with a number of other slaves to Vicksburg, in the state of Mississippi, for the purpose of hiring them out. He refused to sell them, though offered a high price. The slaves were hired out at the commencement of each year, and the plaintiff annually visited the state for the purpose of receiving their hire. He had an agent in Vicksburg, who attended to his business in his absence. In January, 1838, the girl was hired to one J. D. Bruner, who in the month of April following took her to Natchez, and after offering her for sale privately at different times, finally had her sold at auction, when Veill became the purchaser, brought her to New Orleans, and sold her to the defendant, with a full guaranty, without notice of any fraud. The counsel for Veill, the warrantor, rests his defense principally on the ground, that slaves are, by the law of Mississippi, movable property, that possession is *prima facie* evidence of title, and as it is proved that Bruner came lawfully into the possession of the slave by hiring her, his subsequent bad faith and fraudulent conduct towards the real owner, ought not to affect the property in the hands of an innocent purchaser for a valuable consideration. He has called our attention to the distinction between the felonious and fraudulent acquisition of property, and the difference it makes in the rights of a third person, and from the earnestness with which he pressed on us the opinion of one of the dissenting members of the court of errors in New York, in the case of *Hoffman v. Carow*, 22 Wend. 285, it would seem he was desirous of abolishing that distinction.

Upon a full examination of all the cases and principles settled in the United States and other countries, we think the correct doctrine has been laid down by Chief Justice Savage, in the case *Andrew v. Dieterich*, 14 Wend. 34. He says, if goods are taken feloniously, no title is acquired by the felon, and he can convey none to a *bona fide* purchaser; but where the vendor has delivered possession of his goods, with the intent not only that the possession, but the property shall pass, a *bona fide* purchaser from a fraudulent vendee, shall hold the goods in preference to the original owner. The reason is, that the original

owner, by putting his goods in the hands of the fraudulent vendee, has reposed confidence in him, and has enabled him to commit a fraud; therefore the equity of the original owner is not equal to that of the person who has *bona fide* parted with his money or property in the purchase of such goods. The original vendor, by his imprudence, enabled the fraudulent vendee to defraud some one, and should himself be the sufferer rather than a third person, who must otherwise be defrauded: 8 Cow. 238;¹ 5 T. R. 175;² 13 Wend. 570.³

In this case it is evident that Russell had no intention of passing the right of property in the slave in controversy to Bruner, by hiring her to him. He only intended to give a temporary possession, and the subsequent bad faith of the lessee does not deprive the owner of his right of property. The Louisiana code, article 3475, says, that a possession of a movable property for three years, which had been bought at auction or of a third person in the habit of selling such things, will enable the possessor to hold it against the real owner, unless he return the price the possessor gave for it, but this rule, we apprehend, is not applicable to slaves. The case of *Barfield v. Hewlett*, 4 La. 120, is very similar to this. In that case the plaintiff established his title; it was admitted the defendant had purchased the slaves at auction, and took Harraldson's bill of sale. The slaves had been delivered to Harraldson in Tennessee, to be taken to Attakapas or Opelousas, with written instructions to hire them out. Harraldson brought them to New Orleans, where he publicly offered them for sale, and finally put them up at auction. The court said, it is clear the defendant acquired no title, his vendor having none himself, nor authority to convey any.

The judgment of the district court is therefore affirmed so far as it relates to the plaintiff Russell and the defendant Madame Favier; but in relation to the portion of it between the defendant and Veill, her warrantor, it is ordered that said judgment be amended so, that she recover of him five hundred and thirty dollars, with interest at the rate of five per centum per annum, from the second of February, in the year 1839, until paid, and the costs of this suit and the costs of this appeal.

PURCHASE FROM ONE WHO HAS NO TITLE, though in good faith, passes no title as against the real owner: *Saltus v. Everett*, 32 Am. Dec. 540, and note to that case. See also note to *Williams v. Merle*, 25 Id. 605.

1. *Mowrey v. Walsh*.

2. *Parker v. Patrick*

3. *Rost v. French*; 8 C., 28 Am. Dec. 482.

POWER v. OCEAN INSURANCE COMPANY.

[19 LOUISIANA, 28.]

CONDITION IN POLICY OF INSURANCE, that a transfer, if made without the consent of the insurers, shall render the policy void, relates to conveyances by which the interest of the insured is absolutely and permanently divested.

POLICY IS NOT AVOIDED BY A SALE OF THE INSURED PROPERTY, when, before the happening of the loss, the property had reverted to the original owner, by reason of the vendee's failure to pay the purchase price as agreed by the terms of the sale.

CONDITIONAL SALE OF INSURED PROPERTY suspends the risk during the existence of the condition, but the reversion of the property to the vendor upon the failure of the condition revives the risk, and entitles the vendor to all the rights possessed by him before the property was transferred.

APPEAL. The opinion states the facts.

G. M. and F. B. Conrad, for the defendants.

Roselius, for the plaintiff.

By Court, MORPHY, J. The plaintiff seeks to recover one thousand two hundred and fifty-seven dollars and twenty-five cents under a policy wherein defendants insured her against fire to the amount of three thousand dollars, on household furniture, liquors, bar-room fixtures, and billiard tables contained in a building situate at the corner of Champs Elysée and Levee streets, for one year from the second of December, 1837. The record shows that after the date of the policy the property insured was sold to one Ursin Frederick and remained in his possession about six months, but that before the happening of the loss, the property reverted back to the plaintiff in consequence of the vendee's failure to pay for the same; and that plaintiff continued in the exclusive possession of it as owner until, within the term covered by the policy, it was damaged by fire. The policy under which the plaintiff claims contains the following clause: "The interest of the insured in the policy is not assignable unless by consent of this corporation, manifested in writing; and in case of any transfer or termination of the interest of the insured, either by sale or otherwise, without such consent, this policy shall from thenceforth be void and of no effect." It is contended that from the very terms of this clause, the policy became absolutely void from the day of the sale to Frederick, and that it could be revived by no subsequent event.

The decision of this case must rest on the meaning and effect to be given to the foregoing clause inserted in the policy. It

seems to us that its object was to render certain, by positive stipulation, that which otherwise would have depended upon general principles and judicial decisions, to wit, that the policies of the company should not be obligatory any longer than the property insured continued in the individual named in the policy as owner, and that by the transfer of his interest the policy should be void; fraudulent claims upon fire officers have been so frequent that the character of the party proposing to insure has been deemed a matter of importance, and clauses resembling the one under consideration, are now generally to be found in all policies of insurance. It is believed that the nullity they pronounce or imply, according to the terms used, is generally understood as relating to cases where the insured has absolutely and permanently divested himself of all interest in the subject-matter of the insurance; being then without any interest at the time of the loss, the insured has sustained no injury, and the person to whom a transfer is made without the consent of the underwriters can not recover, because he is not a party to the contract; thus the policy becomes inoperative and void; but the question here is whether it continues to be ineffectual when at the time of the loss the property is in the assured as it was at the time of the assurance.

This policy was clearly intended to cover and did cover any furniture, liquors, fixtures, etc., which plaintiff might have in the house at any time during the continuance of the risk, not beyond the amount actually insured; if these articles had been partially and successively sold and replaced by others, or even if plaintiff had thought proper to provide for her bar-room an entire new set of the same articles, and a fire had taken place, the underwriters could hardly have pretended, under the clause in question, that they were absolved from the obligation to indemnify; for their undertaking was to insure her from loss against fire, not on the identical effects existing at the time of the insurance, but on effects or articles of the same description that she might have in her establishment within the term covered by the policy. If notwithstanding such a partial or total sale of the effects insured, the policy would continue to be effectual on account of the subsisting interest of the insured at the time of the loss, there is no good reason why it should not be so in the present case; by the effect of the implied resolatory clause in her sale on credit to Frederick, plaintiff was restored to the possession and ownership of the property, as if no sale or transfer had taken place; her interest which had been parted with only on

condition of her being paid the price can not be said to have absolutely terminated; during the time Frederick owned the effects, there was, it is true, a suspension of the risk, such as would have taken place had they been temporarily removed from the premises, but the risk revived as soon as the property reverted back to plaintiff. Of this the defendants can not complain, because their liability was thereby diminished.

It is sufficient if the insured has an interest or property in the subject-matter of the insurance at the time of insuring and at the time the fire happens. The nullity mentioned in the clause relied on by defendants was, in our opinion, intended and understood by the parties for the case where, by sale or otherwise, an absolute transfer or termination of the interest of the insured should take place so as to leave him without interest at the time of the loss; the stipulation was intended to protect the underwriters from risks they did not choose voluntarily to assume, and to prevent the insured from substituting to himself another person without their consent: La. Code, arts. 2040, 2537, 2542; 1 Ph. Ins. 34; 3 Me. 46; *Lane v. Marine Mutual Fire Ins. Co.*¹

It is therefore ordered that the judgment of the parish court be affirmed, with costs.

PROVISION AGAINST ALIENATION IN A POLICY OF INSURANCE declaring that a conveyance of the premises shall defeat the policy, does not apply to a conveyance by way of mortgage: *Jackson v. Mass. M. F. Co.*, 34 Am. Dec. 69, the note to which refers to other cases on this subject.

CALDWELL v. WESTERN MARINE AND FIRE INS. CO.

[19 LOUISIANA, 42.]

COMPETENT CREW IS ESSENTIAL TO THE SEAWORTHINESS of an insured vessel, and if not provided at the commencement of the risk will constitute a ground for avoiding the policy.

WARRANTY OF SEAWORTHINESS IS NOT BROKEN by the occasional absence of a seaman or deck-hand upon other duties connected with the voyage, as to procure water or provisions, especially when his presence at his post of duty would not have prevented a particular loss by accident.

SALE OF VESSEL AND CARGO DAMAGED BY ACCIDENT is justified only in case of urgent necessity, and after the master has employed due diligence to discover whether other available means of saving either were within his reach.

DUE DILIGENCE IN SUCH CASE depends upon the facts. The master is invested with a discretion depending upon the circumstances, and if it appear that he exercised this power with ordinary good judgment, fairness, and promptitude, the necessity of the sale will be presumed.

1. *Lane v. Maine Mut. Fire Ins. Co.*, 12 Me. 46; 8 C., 28 Am. Dec. 150.

APPEAL. The opinion states the facts.

Peyton and Jones, for the plaintiffs.

Maybin and Grymes, for the defendants.

By Court, GARLAND, J. This action is brought on an open policy of insurance, taken by Lambeth & Thompson, for the benefit of whom it may concern, upon tobacco shipped on flatboats, from any point or landing on the Ohio river, or its tributaries, directly or indirectly, consigned to them in New Orleans. In January, 1838, the plaintiffs shipped on a flatboat, from a warehouse on Green river, in Kentucky, sixty-one hogsheads of tobacco, consigned to Lambeth & Thompson, which, it is alleged, are included in the policy at the rate of sixty dollars per hogshead.

It is alleged and proved that the tobacco was shipped on board of a flatboat, staunch and tight, and in all respects fitted for the voyage, having a competent steersman or master, and the ordinary number of men as a crew. In descending Green river in daylight, in a place where a snag was not previously known to be, the water from ten to fifteen feet deep, with a smooth current, and in a long reach of the river, the boat struck upon a snag which made a hole through her bottom, and in a few minutes she sunk, one end hanging upon the snag. The master and crew appear to have used every effort in their power to save the boat and cargo. Assistance was procured as soon as practicable, and the boat, after being got off the snag, was taken to the nearest landing, her deck only being above water, and the tobacco landed as soon as practicable, but some of it was in the water three days, and all nearly two days. As soon as possible, the master called on the senior justice of the peace of the county for advice as to the best course to pursue: that person not knowing what was best to be done, went with the master to the clerk of the county, at whose suggestion the parties went to the judge of the district, and by the advice and direction of that gentleman, the master made his protest, and took measures to have the tobacco sold, as no other boat could be had to reship it, and the master had neither means nor shelter to open the hogsheads, dry the tobacco, and repack it. No regular survey or appraisal was made of the boat or cargo previous to the sale. The plaintiffs, or their agents, as soon as they heard of the wreck, made an abandonment and claim as for a total loss. The remaining facts will be stated in connection with the grounds of

defense; the defendants having appealed from the judgment given against them.

The first ground relied on for a reversal of the judgment, is, that the boat became unseaworthy or unfitted for the navigation during the voyage, and was so at the time of the loss, by not having on board a sufficient crew. It is in evidence that the ordinary crew of a boat is three persons, that is, a steersman and two hands. At the time of the loss, one of the hands had taken the canoe belonging to the boat, and gone ashore to purchase some sugar for the use of those on board. He was at a short distance when the accident occurred. It is further shown, that at the time the boat was in smooth water, and in a part of the river considered safe. Several of the witnesses, who have navigated the river for years, say they never saw a snag in that place before, and another boat was a few yards ahead, which passed over or very nearly over the same spot in safety. A person who was superintending the works going on to improve the navigation of Green river, says, that in consequence of the number of trees felled on the banks, snags had become fixed in places where they were not before, and the best navigators might be deceived. It is further shown, that if the absent man had been on board, he could not have prevented the accident, as no danger was anticipated. Several witnesses depose, that if five times the number of the ordinary crew had been on board, the accident could not have been prevented.

It is as unquestionably true that a competent crew is as requisite to seaworthiness as having a competent master, and the necessary tackle and apparel, and if the vessel is not properly furnished in that way when she commences her voyage, it is a cause for avoiding the policy: 1 Ph. Ins. 312, *et seq.* But if a competent crew is provided for the whole voyage, the policy is not defeated by the occasional absence of some of the sailors on other duties in the course of it. A ship at sea might, under particular circumstances, be compelled to have a portion of her crew absent for very necessary purposes, and a loss take place during their absence in search of water or provisions, yet we think the policy would not be avoided in consequence. Mr. Justice Bayley held, in the case of *Busk v. Royal Exchange Assurance Company*, 2 Barn. & Ald. 73: "The owner is bound in the first instance to provide a ship with a competent crew, but he does not undertake for the conduct of that crew in the subsequent part of the voyage." 1 Ph. Ins. 314, 315. In this case, when the boat struck, the man was absent for a necessary pur-

pose, and there was certainly less risk in sending him ashore in a pirogue to purchase necessary supplies than to land the flat-boat in a swollen stream, with banks incumbered with fallen timber. This case is very different from those in 6 Mart. (N. S.) 53,¹ and 14 La. 489.² We think the plaintiffs have proved the boat was riverworthy, notwithstanding the absence of one of the crew, and according to the authorities cited from 3 Mason, 439,³ and 2 Wash. 152,⁴ 375,⁵ they have sustained this part of their case.

The second ground of defense is, that the sale was unnecessary. It is certain that a strong case of necessity must be made out to justify a master in selling a vessel or cargo, if other means of saving either be in his reach; and he must avail himself of all proper diligence (taking his situation and the condition of the vessel and cargo into consideration) to procure the means: *Ab. Sh. 2 et seq.* In this case it seems to us the master of the boat acted with great discretion and fairness. As soon as his boat sunk, he used every effort to get it to the shore, and succeeded, although full of water and sunk to the deck. He procured all the assistance in his power to assist in landing the tobacco, and got out every hogshead as soon as practicable, though much damaged. He applied to persons presumed to be most competent to advise him, what was best for the interest of all concerned. The sale appears to have been fairly conducted, and advertisements sent into as many as four counties, from seven to nine days previous to it, and persons attended from a distance of more than forty miles to bid. Two companies were formed who bid against each other, and the tobacco was cried for more than two hours, and sold for one thousand and seventy-five dollars.

It is shown the master could not have procured another boat to ship the tobacco on, or raise and repair the one sunk, and it is further shown that if he had been able to do so, the tobacco would have been rotten before it could have reached New Orleans. Two witnesses engaged in the tobacco business in this city state such to be their opinion, and relate an instance where a cargo of tobacco was sunk near Helena, in Arkansas, remained in the water only six or eight hours, then brought to the city in a steamboat, and the loss was sixty-two per cent. That it would have been

1. *Gotochea v. La. State Ins. Co.*; 8 C., 17 Am. Dec. 178.

2. *Whitney v. Ocean Ins. Co.*; 8 C., 33 Am. Dec. 595.

3. *Humphreys v. Union Ins. Co.*

4. *Watson v. Ins. Co. of North America.*

5. *Cort v. Delaware Ins. Co.*

total, if brought from Green river, in Kentucky, on board of a flatboat, we can not doubt.

The defendants say the master and crew should have opened the hogsheads and dried the tobacco. The evidence on this point satisfies us that it was not in his power to do so. For that purpose it was necessary to have a number of houses or barns in which the tobacco could have been hung up. After it was dried it was necessary to let it remain suspended, until the weather should make it sufficiently moist to be handled without injury, so as to put it in bulk, and then into the hogsheads. All the witnesses who saw the tobacco, say that at the place where it was lying, no shelter or covering could be had to put the hogsheads under, after they were taken from the water, and they were exposed on the bank nine days. On the day of the sale water was still draining from some of them. The tobacco was purchased by a company, composed of persons in the neighborhood, by whom it was hauled to several plantations, where it could be opened, and the necessary houses and presses or prizes found for the drying and repacking it. Brown, one of the purchasers, says, that sixteen hands were employed nearly two months, before the boat could be raised and repaired and the tobacco in a condition to be shipped again. The witnesses state the tobacco sold for fully as much as it was worth, and we are satisfied such an eminent necessity existed for the sale as to justify the master in acting as he did.

The judgment of the commercial court is therefore affirmed, with costs.

IMPLIED WARRANTY OF SEAWORTHINESS.—The subject of what is included within the implied warranty of seaworthiness in marine insurance is discussed, and the authorities, both in this series and elsewhere, reviewed in *Fleming v. Marine Insurance Co.*, 33 Am. Dec. 37; *Whitney v. Ocean Insurance Co.*, Id. 595, and *McMillan v. Union Ins. Co.*, Id. 112, and the notes to these cases.

WHEN MASTER MAY SELL INSURED VESSEL: See *Robertson v. W. F. & M. I. Co.*, post.

BUCKNER v. WATT.

[19 LOUISIANA, 216.]

LEX LOCI CONTRACTUS DETERMINES AS TO VALIDITY OF CONTRACTS.

NO STATE IS BOUND TO RECOGNIZE AND ENFORCE CONTRACTS INJURIOUS TO ITS OWN INTERESTS OR THOSE OF ITS SUBJECTS, ALTHOUGH VALID BY THE LAW OF THE PLACE WHERE MADE.

STATUTE OF THIS STATE IN DEROGATION OF THE RULES OF EVIDENCE AS ESTABLISHED ELSEWHERE, WILL NEVERTHELESS, AS TO CONTRACTS ENTERED INTO IN

another state, be obeyed and executed in any action brought to enforce such contracts in this state.

REHEARING. The facts are sufficiently stated in the opinion.

T. Slidell and Roselius, for the appellant.

G. B. Duncan, *contra*.

By Court, GARLAND, J. The application for a rehearing in this case was granted exclusively on the point, whether the evidence of Harper and Carpenter, who were two of the firm of Harper, Carpenter & Co., the drawers of the bill sued on, was admissible. In Mississippi, where the bill of exchange sued on was drawn, the drawer is a competent witness in a suit between the holder and indorser of it, but in this state we have a statute which enacts, that "the drawer of a note or bill of exchange, or other negotiable paper, shall never in any case whatsoever be admitted as a witness in any civil cause or suit brought by the holder of any such note, order, bill of exchange, or other negotiable paper, against any of the indorsers of said notes, orders, bills of exchange, or other negotiable paper, for the recovery of the capital and legal interest of the said notes, orders, bills of exchange, or other negotiable paper:" 1 Moreau's Dig. 624. The defendant's counsel contends that, as the contract was made in Mississippi, it must be governed by the laws of that state, not only as to the form and matter of the contract, but also in relation to the evidence by which it is to be supported or invalidated. He therefore insists that, as Harper and Carpenter were competent witnesses in Mississippi, they are so here. In the absence of any statutory provision this might be a nice question; one upon which jurists are divided in opinion, and the authorities nearly balanced.

Judge Story, in his *Conflict of Laws*, says: "Generally speaking, the validity of a contract is to be decided by the law of the place where it is made. If valid there, it is, by the general law of nations, *jure gentium*, held valid everywhere by the tacit or implied consent of the parties." The same rule has been well established in our jurisprudence: Conf. L., ed. 1841, sec. 242; 11 Mart. 730;¹ 12 Id. 475;² 8 Id. 95;³ 1 Mart. (N. S.) 202;⁴ 1 Pet. 317;⁵ 13 Id. 378, 379;⁶ and various other authorities cited by the learned author of the *Conflict of Laws*. But to this rule there is an exception as to the universal validity of contracts; which is, that "no nation is bound to recognize or en-

1. *Morris v. Eves*.

2. *Evans v. Gray*.

3. *Whiston v. Stodder*; S. C., 13 Am. Dec. 281.

4. *Brown v. Richardsons*.

5. *Willings v. Consequa*, 1 Pet. C. C. 217.

6. *Wilson v. Hunt*.

force any contracts which are injurious to its own interests or to those of its own subjects: Conf. L., sec. 244, p. 203; 2 Mart. (N. S.) 73;¹ 5 Id. 587;² 13 Pet. 65, 78.³ The reason why the courts of one state or nation will execute contracts according to the laws of another, rests upon a principle of comity and convenience among nations, which can not be extended so far as to violate the positive legislation of the state or nation whose court is called on to enforce the foreign contract and law. We are bound to believe that the legislature, when the statute in question was enacted, supposed that the rule of evidence which was then in force in this state, as well as in Mississippi, was injurious to the interests of our citizens, and therefore changed it. We can not violate their will, although the necessity of the law may not be so apparent to our minds as it was to those who had the power to enact it.

We, therefore, see no reason for changing the opinion heretofore given.

A STATE WILL NOT ENFORCE CONTRACTS MADE ELSEWHERE by its citizens, if they are in violation and fraud of its laws: *Hinds v. Brazeale*, 32 Am. Dec. 307, in the note to which the cases relating to this subject heretofore reported in this series are cited.

ROBERTSON v. WESTERN MARINE AND FIRE INS. CO.

[19 LOUISIANA, 227.]

MASTER MAY SELL INSURED CARGO for the benefit of all concerned, where it has been so damaged by the perils of navigation, that no practicable course remains to be pursued by which it can be restored to its original state, or preserved from total loss.

AFTER ABANDONMENT, THE INSURED, IN MAKING SALE of the insured property, becomes the agent of the insurers.

AGENT OR TRUSTEE CAN NOT PURCHASE AT SALE MADE BY HIM for the benefit of his principal or *cestui que trust*, without the consent of the latter.

PURCHASE OF INSURED PROPERTY BY THE OWNER at a sale for the benefit of all concerned, is equivalent to a revocation of his prior abandonment, and will preclude him from recovering on a claim for a total loss.

PARTICULAR USAGE AND CUSTOM, by which owners of insured property were permitted to purchase the property at sales for the benefit of the insurers, can not have the effect of legalizing a sale which, by the general law, is unlawful and void.

APPEAL. The opinion states the facts.

Jones and Peyton, for the plaintiff.

Maybin and Grymes, contra.

1. Extor. 2. *Saul v. Creditors*; 8 C., 16 Am. Dec. 212. 3. *Andrews v. Pond*.
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By Court, MORPHY, J. This action is brought on an open policy of insurance taken by Lambeth & Thompson, commission merchants of New Orleans, for whom it may concern. The plaintiffs seek to recover three thousand seven hundred and twenty dollars, the value of fifty-eight hogsheads of tobacco, at the rate of sixty dollars per hogshead. They allege, that on or about the ninth of January, 1838, they shipped this tobacco on board the flatboat *Lady Marshall*, whereof James Saunders was master, from Greensburg, on Green river, in the state of Kentucky, to the address of the said Lambeth & Thompson, of this city; that while said boat was descending Green river, on her way to the place of destination, and about one hundred and fifty miles below Greensburg, she was wrecked and sunk in consequence of running on a rock, notwithstanding the exertions of the master and crew to avoid the accident: that a total loss of said tobacco has thus occurred by one of the perils insured against, to wit, the dangers of the river; and that they have made an abandonment to the company of such part of the tobacco as could be saved from the wreck. The underwriters rest their defense on two grounds, to wit: 1. That the sale of the damaged tobacco made by the master was unnecessary and illegal. 2. That the abandonment in this case was waived, because the tobacco was purchased by the plaintiffs.

1. On the first ground of defense, it has not been, nor could it be denied, that in cases of necessity the master, upon whom the character of agent is in some manner forced, is authorized to sell for the benefit of all concerned; but it is contended, that the circumstances of this case did not justify a sale; that the tobacco could have been dried, repacked, and forwarded to New Orleans by the master, as it has been subsequently by the purchasers. The evidence shows that notwithstanding the exertions of the crew, and what additional hands could be procured, the tobacco remained several days under water; that some of the heads of the hogsheads were bursted out, and the tobacco saturated with water. The witnesses and appraisers agree, that the damage done to it exceeded fifty per cent. If another boat could have been procured on the spot (of which there is no evidence), it would have been contrary to the interest of the insurers to reship the tobacco in its then damaged condition; for it would have become rotten and entirely worthless long before it reached New Orleans.

But admitting, as defendants contend, that it could be considered the duty of the master to go through the tedious, expen-

sive, and uncertain process of opening, drying, and reprizing the damaged tobacco, we are satisfied from the testimony, that it was impracticable for him to do it. There was on board upwards of eighty hogsheads of tobacco, and the master was bound to take care of the whole of it; numerous barns or shelters were necessary for the operation, and none were to be had on the bank of the river, nor could a sufficient number of hands be procured. Two months at least would have been required to prepare the tobacco for reshipment, and then from the uncertainty of the navigation of Green river, the cargo might have been detained several other months waiting for a tide. The master declares, that he thought it more advisable to sell the tobacco, damaged as it was, because the expense would have been much more, to have fitted up and repaired the boat, and dried and repacked the tobacco, than it would have sold for in New Orleans. Two witnesses who express the opinion, that the tobacco could have been dried and reprized, admit, that the process would have been very expensive. It further appears, that the purchasers of the tobacco had to send it a distance of ten miles, and to procure a person of skill and experience to attend to the drying and reprizing of it; that it required a number of barns and shelters, and a great number of hands, and that it was nearly three months, before the tobacco was ready for reshipment. Under such circumstances, it appears to us, that the master was not bound to impose on himself and his crew these new and troublesome duties, and was justified in selling the damaged cargo. Then being no longer near the place, the master consulted with one Barrett, the clerk of the county court of the county, where the accident happened. Notices of the sale were stuck up in different public places during several days in three or four of the adjoining counties, and everything appears to have been conducted with good faith and fairness on the part of the master: 2 Ph. 311, 328; 1 Doug. 234;¹ 12 Johns. 107;² 2 Sumn. 215.³

2. On the second point, we are of opinion, that the purchase by the insured was illegal, and had the effect of revoking their abandonment; it turned the total into a partial loss. It is now well settled, that when the insured abandons and claims as for a total loss, if it becomes necessary to sell the subject of the insurance, he can not purchase it on his own account without waiving the abandonment. This rule is said to be founded in sound policy,

1. *Miles v. Fletcher*.

2. *Saltus v. Ocean Ins. Co.*; 8 C. 7 Am. Dec. 290.

3. *The Sarah Ann*.

to prevent fraudulent speculations upon a loss, at the expense of the insurer. It rests also on the broad and well-known principle, that a trustee can not become the purchaser of the estate of his *cestui que trust*. After an abandonment, the insured becomes the agent of the insurers, and standing in that relation he can not purchase except with the consent of his principals. If he does, and the purchase is not sanctioned by the insurers, the abandonment is waived and annulled. It has been remarked, that this doctrine applies with great force and reason to cases of insurance. By-standers will seldom bid at sales of property in that situation, where they see the original owner is himself bidding with a view, as they may suppose, to save something from the wreck. The underwriters, being in most cases at a distance from the spot where the loss happened, would be exposed to great impositions if the rule were relaxed: 2 Cai. 280;¹ 9 Pick. 466;² 3 Johns. 39;³ 5 Id. 810;⁴ 10 Id. 177;⁵ 12 Id. 24;⁶ 1 Mason, 341;⁷ 2 Id. 369;⁸ Ph. 409, 410.

But it is urged, that these authorities do not apply to the present case, in which all the proceedings in relation to the sale were conducted, from beginning to end, by the master as sole agent of the underwriters; that by the abandonment the property was transferred to the insurers, and that from that moment the master ceased to be the agent of plaintiffs, and became theirs; from whence it is argued, that the insured are to be considered as strangers, having nothing to do with the sale, and competent to purchase like any other person. It is undoubtedly true, that the master, or whoever has the charge of the property, becomes instantly upon abandonment the agent of the insurers; but this must be understood in cases where the owners are not themselves on the spot; for if they are, they become the agents of the underwriters as well as the master, and the latter will naturally consult with them, and be guided by their advice and directions; especially when, as in the present case, a regular abandonment has not yet been made. A few days before the sale, the master, it is true, entered his protest, in which he declared, that the sale or reshipment of the tobacco would be made for the underwriters; but the notice of the loss and of the inten-

1. *United Ins. Co. v. Robinson*.

2. *Hall v. Franklin Ins. Co.*

3. *Livingston v. Columbian Ins. Co.*, 3 Johns. 49.

4. *Walden v. Phœnix Ins. Co.*

5. *Ogden v. New York Fire Ins. Co.*

6. *Ogden v. New York Firemen's Ins. Co.*, 12 Johns. 25.

7. *Church v. Mar. Ins. Co.*

8. *Barker v. Mar. Ins. Co.*

tion to abandon was given to the defendants only after the sale. Besides, the insured agrees by the policy, that if he takes any step in regard to the property after an abandonment, he will act as the agent of the insurers as well as his agents, captain, supercargo, etc.: 2 Cond. Marsh. 614.

In most of the cases in which a purchase by the owners has been held to be a waiver of the abandonment, it will be found, that the sale was made under the authority of the master. The record contains some evidence tending to show, that it is the prevailing usage in that section of the country, for the owners of damaged tobacco to buy it in at the sales made for the account of the underwriters. This usage, admitting it to exist, can not surely justify, in a legal point of view at least, that which by the settled law of insurance has been held to be unlawful. It is not, besides, proved to have been of such long standing and general notoriety as to authorize the presumption, that the parties have contracted with reference to it. The plaintiffs can, in our opinion, recover only for the partial damage sustained, which is proved to have been fifty per cent., and the expenses for saving the tobacco, which amounted to one hundred and seventy dollars.

It is therefore ordered and decreed, that the judgment of the commercial court be avoided and reversed; and proceeding to give such judgment as, in our opinion, should have been rendered below: it is ordered and decreed, that the plaintiffs do recover of the defendants nineteen hundred and ten dollars, with costs below, those of this appeal to be borne by the plaintiffs and appellees.

WHERE THE COST OF REPAIRS WOULD EXCEED ONE HALF THE VALUE of a vessel as repaired, the insured may abandon for a total loss: *Cohen v. Charleston F. & M. I. Co.*, 31 Am. Dec. 549, and note. As to when master has authority to sell, see *Peirce v. Ocean Ins. Co.*, 29 Id. 567, and note.

TRUSTEE CAN NOT PURCHASE AT HIS OWN SALE.—The authorities in this series on this subject are collected in the note to *Scott's Ex'r v. Gorton's Ex'r*, 33 Am. Dec. 581.

GUIDRY v. WOODS.

[19 LOUISIANA, 334.]

CERTIFICATE OF PURCHASE OF PUBLIC LANDS issued by the register and receiver does not constitute evidence of title.

SUCH CERTIFICATE IS EVIDENCE that the applicant was then in possession, and that he had cultivated the land in the time and manner required by law.

REGISTER AND RECEIVER HAVE NO JURISDICTION to grant titles by pre-emption.

COMMISSIONER OF THE GENERAL LAND OFFICE HAS AUTHORITY, under the supervision of the secretary of the treasury, to determine the construction of acts of congress relative to the public domain, and if it appear that the register and receiver have issued a certificate of purchase to lands the sale or disposal of which is unauthorized by law, may revoke or annul it.

RECORDS OF THE GENERAL LAND OFFICE and deposition of the commissioner are admissible to prove the cancellation by the commissioner of the certificate of entry and purchase issued by the register and receiver to land not subject to pre-emption.

FINAL JUDGMENT IN FAVOR OF A DEFENDANT MAY BE ENTERED upon an appeal from a judgment of nonsuit in his favor, when the proceeding is a petitory action to try title, and the defendant exhibits the best title to the lands in question.

APPEAL from a judgment of nonsuit. The opinion states the facts.

Linton and Voorhies, for the plaintiff.

Swayzé and T. H. Lewis, for the defendant.

By Court, **BULLARD, J.** The plaintiff asserts title to a lot of ground, containing one hundred and twenty-six acres and three one hundredths of an acre, being in township three south, range three east of the basis meridian on south of latitude thirty-one, which he complains has been taken possession of by Martin Woods, the defendant, to his damage, and he prays that the title may be decreed to be in him. The defendant, after denying generally the allegations in the plaintiff's petition, alleges that he, the respondent, long since in person settled on, inhabited, and cultivated the lot of land sued for. That he was an actual settler on said land, and head of a family, and above twenty-one years of age, and a housekeeper on the twenty-second day of June, 1838, and for four months preceding, commencing on the twenty-second of February, 1838. That by reason of the premises, the title to said land vested in him by virtue of an act of congress, approved on the twenty-second of June of that year, entitled an act to grant pre-emption rights to settlers on the public lands. That he fully proved all the foregoing facts before the register and receiver at Opelousas, but that those officers, in violation of law, and in disregard of the positive instructions of the commissioner of the general land-office, permitted the entry of said land by virtue of a floating right. That the plaintiff never produced his written consent to the entry of said land. That the defendant has appealed from the decision of the register and re-

ceiver to the commissioner of the general land-office, and the object of this action is to defeat that appeal. There was judgment for the defendant as in the case of nonsuit, and the plaintiff appealed. The appellant has not favored us with any arguments, either written or oral, and relies, we presume, upon the evidence of his title in the record. The appellee, in answer to the appeal, prays that the judgment may be amended and rendered final in his favor, instead of one of nonsuit.

It is shown conclusively, that the purchase or entry by the plaintiff has been upon opposition or appeal, annulled and declared void by the commissioner of the general land-office, and that decision approved by the secretary of the treasury. This decision is founded upon several grounds, one of which is, that a township plat, duly approved by the township in which the land is situated, did not exist in the office at the time of the purchase; and another, that the float of the plaintiff was not located at the same time, that he availed himself of his principal pre-emption right as an actual settler, according to the construction put upon the act of congress by the land department. This decision was communicated to the register and receiver at Opelousas, and the commissioner, in a subsequent communication, remarks: "This office having, upon a reference of the case of Hypolite Guidry and Celeste de Lafosse, decided that the floats of either of those individuals could be located on township three south, range three east; and in a letter of the seventeenth of November, communicating to you that decision, and having, notwithstanding, permitted the floats of those individuals to be located in said township, and one thereof on lot seventy-two, township three south, three east, above mentioned, this office on the eighteenth of December last, for those reasons and others mentioned in that communication, canceled certificates 1917 and 1918. Said tract therefore, being public land, no reason is seen, why the claim of Martin Wood should not have received some action at your hands; and it is accordingly returned for your examination and decision."

It is clear, that the mere certificates of purchase, such as are exhibited in this case, are not final evidence of title out of the government; although this court has generally considered them sufficient evidence of a sale from the government, as to be the basis of a petitory action. Such certificates are liable to be canceled by the land department, when they are shown not to have been fairly and legally obtained. The decision of the register and receiver, in the absence of fraud, would be conclusive

as to the facts, that the applicant for the land was then in possession, and of his cultivation of the land within the previous year; because these questions are directly submitted to those officers. Yet, if they undertake to grant pre-emptions to land on which the law declares they shall not be granted, then they are acting upon a subject-matter clearly not within their jurisdiction; as much so as a court whose jurisdiction was declared not to extend beyond a certain sum, should attempt to take cognizance of a case beyond that sum: 13 Pet. 498. The evidence further shows that the certificate was not granted, or the entry made, until long after the act of congress of 1834, under which it purports to have been given, had expired by its own limitation. The purchase appears to have been made in virtue of a pre-emption float, under the act of congress of the nineteenth of June, 1834, and the certificate of purchase bears date May 3, 1838. The construction put upon that law at the department has always been, and the instructions to the registers and receivers conformable to it, that these floating rights, as they are called, to eighty acres, under the act, must be entered and located at the time of entry of the tracts, on which such floating rights accrued, and that these floats are liable to the same disabilities as the original pre-emptions under which they accrued, and which the law requires to be located before the commencement of the public sales, which shall include such original pre-emption tracts: Public Lands, part 2, Opinions and Instructions, 633 *et seq.*

We do not doubt the authority of the commissioner of the general land-office, under the supervision of the secretary of the treasury, to decide upon questions such as that presented by the case of Guidry, relating to the true construction of the act of congress, and declaring void a certificate of purchase of lands, which the law forbids to be sold or disposed of; although the register and receiver alone have jurisdiction to decide who is entitled to a pre-emption, that is to say, as to the sufficiency of proof of settlement and cultivation under those acts: 4 La. 549;¹ 6 Id. 12.² But even if the land department has decided otherwise, we held, in the case of *Jourdan et al. v. Barrett et al.*, 13 La. 41, that the decision of the secretary of the treasury, under the back-concession or pre-emption laws, approving the operations of the surveyor-general, in making the apportionment among different claimants, was not conclusive upon the legal rights of the parties under the act of congress. The same

1. *Widow and Heirs of Henry v. Welsh*; S. C., 23 Am. Dec. 490. 2. *Primot v. Thibodeaux*,

principles apply to other officers, who do not act judicially. The present case can hardly be distinguished from that of *Marsh and Miller v. Gonsoulin*, so far as concerns the right of the defendant: 16 La. 84.

The court, in our opinion, erred in rejecting the written evidence of the canceling of the plaintiff's certificates, and the depositions of the commissioner of the general land-office. The certificates having been declared null by competent authority, and being evidently void under the act of congress, which forbids the disposition of the public lands, until a township plat, duly approved, shall be returned to the officer, and on other legal grounds, it is clear the plaintiff exhibited no subsisting title to the *locus in quo*. The defendant insists upon his right to a final judgment, instead of one of nonsuit. Although this court disclaims any right to decide upon the question, whether the evidence of occupancy and cultivation be sufficient to entitle the defendant to purchase as a pre-emptioner, yet we do not see why there should not be final judgment against the plaintiff, and the defendant be protected in his possession against any future action upon the same pretended title. Without deciding, therefore, that the defendant has a valid title against the government, or any other person, we think his title better than that exhibited by the plaintiff.

It is therefore adjudged and decreed, that the judgment of the district court be reversed and annulled, and ours is, that there be final judgment against the plaintiff, and that he pay the costs of both courts.

RIGHT OF PRE-EMPTION CREATES NO TITLE to land prior to the exhibition of the necessary proofs: *Henry v. Welch*, 23 Am. Dec. 490, in the note to which the subject is considered and the authorities reviewed. The question how far decisions of the register and receiver of the United States land office are final in matters passed upon by them, is considered in the following cases and the notes thereto: *Boatner v. Ventress*, 20 Id. 266; *Henry v. Welch*, 23 Id. 490; *Bird v. Ward*, 13 Id. 506.

WAFER v. PRATT.

[1 ROBINSON, 41.]

SHERIFF IS PRESUMED TO BE RIGHTFULLY IN POSSESSION of property taken in execution.

PERSON CLAIMING PROPERTY TAKEN BY A SHERIFF IN EXECUTION, must, in a suit against the officer, establish a clear and perfect right or title.

TITLE BY PRESCRIPTION CAN NOT BE ACQUIRED by possession unaccompanied by any claim of ownership.

POSSESSION FOLLOWS THE TITLE where several are in the contemporaneous use and occupation of property.

APPEAL. The facts are stated in the opinion.

Downs, Copley, and Friend, for the plaintiff.

McGuire, for the defendant.

MORPHY, J. Plaintiff enjoined the execution of a writ of *feri facias* under which the sheriff of the parish of Claiborne had seized and was proceeding to sell a negro man named Jim, as belonging to Joel Wafer, against whom defendant had obtained a judgment; he alleges that for several years past he has had the actual and quiet possession of the boy, and that he is the legal and equitable owner of him. The defendant moved the court that plaintiff be ruled to prove the allegations in his petition, and upon failure thereof that the injunction be dissolved with damages. The sheriff pleaded the general issue, averring that he seized the slave as the property of Joel Wafer, who claimed him as owner twenty years ago, and has continued to own him ever since, though he permitted the plaintiff, his brother, at whose house he frequently lived, to have the services of the boy and of other property of his, but that plaintiff never claimed to own this slave until the institution of defendant's suit against his brother, Joel Wafer, about one year ago. The judge below made the injunction perpetual, from which decree the defendants have appealed. It appears to us from the testimony on record, that the court erred. When the sheriff is in possession of property by virtue of a seizure under execution, he must be considered as a rightful possessor holding for the benefit of the plaintiff in the writ, until it be clearly shown that the property seized belongs to another person than the defendant from whom it may have been taken. The right of a third party to oppose an execution is limited to cases where he owns the property or has a privilege on it. When the former ground is assumed, the person making the opposition is in the position of a plaintiff in a petitory action; he must make out a clear title, otherwise he must fail in his attempt to arrest the sale: Code of Pr., art. 396; 5 Mart. 268; 8 Mart. (N. S.) 661.¹

On the trial, the plaintiff in injunction exhibited no title whatever to the slave in question; on the contrary, the evidence by him adduced shows that as far back as 1819 or 1820 Joel Wafer brought this slave to Arkansas as owner, before the plaintiff himself went to that state. That since then the plaintiff

1. *Prevot v. Hennen*.

2. *Lacy v. Buhler*.

iff and his brother, Joel Wafer, have almost constantly lived together, either in Arkansas or in Louisiana, and particularly during the last ten or twelve years. The long possession then which plaintiff has shown can not avail him, because he did not possess as owner, and his possession was not exclusive. If he had acquired any title to the slave from Joel Wafer, his other brother, Thomas Wafer, and his brother-in-law who testified as to his possession, could have proved it, as they lived together for a number of years; but as no transfer to plaintiff is shown of whatever right or title Joel Wafer originally had to this slave when he took him to Arkansas, we are bound to believe that plaintiff did not possess him as owner, and could not therefore acquire title to him by prescription: Civ. Code, arts. 3399, 3409, 3476, 3439. We have held, that when a vendor and vendee live in the same house, possession follows title: 8 Mart. (N. S.) 337.¹ The testimony, moreover, shows that the plaintiff began to claim to be the possessor of the slave as owner only since his return from Arkansas in 1828; from which time the prescription provided for by article 3439 has not taken place.

It is therefore ordered, that the judgment of the district court be reversed; and proceeding to give such judgment as should have been rendered below, it is adjudged that the injunction be dissolved, and that the plaintiff and appellee pay costs in both courts.

POSSESSION MUST BE UNDER A CLAIM OF TITLE IN ORDER TO BE ADVERSE: *La Frombois v. Jackson*, 18 Am. Dec. 463, and note; *Jackson v. Johnson*, 15 Id. 438; *Mitchell v. Walker*, 16 Id. 710. Where the possession is concurrent, neither party can acquire title against the other by an adverse holding: *Union Canal Co. v. Young*, 30 Id. 212, and note.

RATOLIFF v. BRIDGER.

[1 ROBINSON, 57.]

SALE OF IMPROVEMENTS ERECTED ON PUBLIC LAND of the United States forms a good consideration for a promissory note given for their price. **NO TITLE TO OR LIEN OR PRIVILEGE UPON THE LAND** is transferred by or implied in such sale independent of the rights conferred by the laws of the United States.

APPEAL. The facts are stated in the opinion.

Mayo and Garrett, for the plaintiff.

McGuire and Ray, for the defendant.

1. *Richards v. Nolan*.

GARLAND, J. The defendant being sued on his promissory note for two thousand dollars, pleads that he was induced to sign it by the fraudulent and false representations of the plaintiff, who pretended to be the owner of valuable improvements upon public land upon Long Lake, in the parish of Caldwell, which he sold defendant. He says these improvements were not worth two hundred dollars. He says there was error on his part, fraud on the part of plaintiff, and no consideration for the note.

We find in the record a sale in writing from plaintiff to defendant of all his claims and improvements on Long Lake upon the public domain, it being distinctly understood and expressed at the time, that the land, for which the note was given, belonged to the United States. The defendant endeavored to prove the improvements were not worth as much as he promised to give for them, and contends that the sale of them was illegal, as the parties expected a pre-emption right might be obtained at some future day. Nothing is said of a right of pre-emption in the sale, and if Bridger ever gets one, it will be by virtue of his settlement, and not of the purchase made from plaintiff. The evidence in relation to the value of the improvements varies a good deal as to their value, but there is no plea of lesion. We are of opinion that improvements made on the public land may be sold, and form a good consideration for a promissory note, but such sale gives no title to, or lien or privilege upon the land, independent of the rights conferred by the laws of the United States: 16 La. 232.¹ The defendant complains most ungraciously of the sale made to him by the plaintiff. We see from the evidence, that he purchased of the plaintiff four or five improvements; he has by an authentic act sold three of them to a man named Holt for two thousand dollars; he occupies the others, and now coolly turns upon his vendor and charges him with fraud for doing what he has himself done. We will not countenance such conduct.

Judgment affirmed.

DEBLIEUX v. BULLARD.

[1 ROBINSON, 66.]

NOTICE TO INDORSEER IS NOT INVALID BECAUSE GIVEN UPON LEGAL HOLIDAY, though the indorser would not be bound to act upon the notice until the day following.

CERTIFICATE OF NOTARY IS NOT EVIDENCE OF PROTEST in this state, unless subscribed by two attesting witnesses.

APPEAL. The opinion states the facts.

Mores and Roysden, for the plaintiffs.

Bullard, *in pro. per.*, and *Tuomey*, for the defendants.

MARTIN, J. The defendants are appellants from a judgment against them as maker and indorser of two promissory notes. They pleaded the general issue only. The maker has made no defense in this court. His plea admits his signature to the note, and a close examination of the record has not enabled us to discover any ground on which the judgment against him may be disturbed. His co-defendant, Long, who is the indorser, has urged that notice of protest of one of the notes was given to him prematurely. It became due on the first to the fourth of July, 1838; was correctly protested on the third, but notice was given to him on the fourth of July, which by law is a day of rest. The act of March 7, 1838, sec. 5, directs that when the last day of grace is a public day of rest, the protest is to be made on the preceding day; but that act is silent with regard to the giving of notice.

It is the frequent complaint of indorsers that notices of protest are given too late. This is the first time in our jurisprudence that a complaint is made of notice being given too early. The earliest notice of protest affords the greatest facility to the indorser to guard and protect his interests. The English books say that notice may be given on a Sunday, public days of rest, thanksgiving, etc., but that the indorser is not bound to open the letter containing the notice, or to act on it, until the next day: Bayley on Bills, ed. 1836, 265, 266, and notes. This principle of the English law is founded in that sound reason which is the same in all countries. *Nec erit alia Romæ, alia Athenis*—on the banks of the Mississippi and on the banks of the Thames. As the indorser has pleaded the general issue, a plea which puts the plaintiff on proof of notice of the protest, we are bound to examine whether there is legal proof in the record of the notice of protest of the second note. Of this there is no evidence except the certificate of the notary, which is liable to this objection, to wit: that it wants the attestation of two witnesses. See act of February 14, 1821, sec. 1.

This question has just received the examination of this court, and its solution, in the case of the *Gas Light Bank v. Nuttall*, just decided, 19 La. 447; and the conclusion at which we have arrived is, that the objection is fatal. There is no other evidence of notice than the notary's certificate, and that is insuffi-

cient to enable the plaintiffs to recover on the second note in this suit, as against the indorser.

It is therefore ordered that the judgment of the district court be affirmed so far as it relates to the maker of the note, with costs and five per cent. damages; and that it be reversed as to the indorser, William Long; and proceeding to give such judgment as, in our opinion, ought to have been rendered in the court below, it is ordered that the plaintiffs do recover of the defendant, William Long, the sum of eighteen hundred and one dollars, with ten per cent. interest thereon from the fourth of July, 1838, until paid, being the amount of the first note sued on; and it is further ordered that there be judgment as in case of nonsuit, for the said defendant, Long, as to the second note of eighteen hundred and one dollars; the costs of the appeal to be paid by the plaintiffs and appellees.

HOLIDAYS ARE NOT ESTIMATED IN COMPUTATION OF TIME when the day of performance falls upon that day. An exception exists where the last day of grace falls upon Sunday; demand may then be made upon the day previous: *Salter v. Burt*, 32 Am. Dec. 530, the note to which refers to the other cases reported in this series and elsewhere upon this subject.

NEW CASTLE MANUFACTURING CO. v. RED RIVER R. R. Co.

[1 ROBINSON, 145.]

VENDOR OF MERCHANDISE PURCHASED BY A SUBAGENT of another from whom the merchandise was ordered, can not charge the person in whose interest the purchase was made, although the sale was made with the knowledge that the goods were destined for the use of such person, where it appears that credit was given directly to the individual from whom the goods were primarily ordered, and not to the one for whose use they were intended, and that until after the insolvency of the former, no attempt to hold the latter responsible was made.

FOREIGN AGENT OR FACTOR IS PERSONALLY LIABLE on contracts made by him in the interest of the person by whom he is employed.

AGENT NEED NOT DESCRIBE HIMSELF AS SUCH in the contract in such case, but in the absence of evidence showing that credit was given to the principal, it will be presumed to have been given to the agent exclusively.

APPEAL. The opinion states the facts.

Dunbar and Hyams, for the appellants.

Ogden and Brent, contra.

MORPHY, J. The defendants are sued for the value of a certain number of sets of wheels, axles, boxes, and other machinery, which the plaintiffs allege they sold and delivered to them at their special instance and request, some time in December, 1836. The answer denies the facts set forth in the plaintiff's petition, and avers that the defendants are perfect strangers to the New Castle manufacturing company, and have never had any dealings with them; that they never contracted with them, nor authorized any one to contract with them in their name and on their account; and that the said company has no claim against them in law or equity. There was a verdict below in favor of the defendants. After vainly endeavoring to set it aside, the plaintiffs appealed.

The record shows that some time in July or August, 1836, the house of M. de Lizardi & Co. received instructions from the defendants to procure for their use the articles mentioned in the plaintiff's petition; that in order to obtain them, they employed the house of R. & J. Phillips, of Philadelphia, who applied to the plaintiffs to execute the order, informing them that the articles were wanted by and were for the use of the Red river railroad company. The articles, when ready, were forwarded to R. & J. Phillips, who consigned them to the house of M. de Lizardi & Co. In two letters addressed to R. & J. Phillips by the plaintiffs, they inclosed the bills for the wheels and other articles they had furnished, and advised them that the amount had been placed to their debit. No correspondence whatever passed between the plaintiffs and defendants, nor between the former and the Lizardis, who never knew until after the institution of this suit, by whom the order had been executed. They declare that they sent the order to be executed on their own credit, and that shortly after receiving the goods they forwarded the amount to the Messrs. Phillips, in bills on England, which have since been paid by the defendants. It further appears that on the ninth of December, 1836, the plaintiffs in a letter inclosing a general bill for the iron work furnished for the Red river railroad company, advised R. & J. Phillips that they would be drawn on in a few days at short date therefor, and that the said R. & J. Phillips, in reply, requested that no draft should be drawn on them but at four months, as they could not receive the funds for a month, when the remittance to them would be in sixty days sight bills; and that they would accept such a draft, and see that the money was obtained. This proposition was

acceded to by the plaintiffs, who received the acceptance of the Phillips for the amount. The draft was not paid at maturity, nor has it been paid since; but the evidence shows that when the Phillips accepted plaintiffs' draft, they were enjoying unbounded credit in the United States and in Europe, and that they maintained their credit until March, 1837.

It appears to us that the defendants can not be made liable to the plaintiffs, between whom and them there is no privity of contract. It is clear that although the plaintiffs knew that the articles were for the use of the defendants they looked to R. & J. Phillips for payment, and trusted to them exclusively; advising them that they had been debited for the amount of the articles delivered, they negotiated with them to obtain their acceptance; and even when this acceptance was protested, they do not appear to have looked to the defendants as in any way liable to them. They give them no notice that they were unpaid for the goods forwarded, and only brought the present suit fifteen months afterwards, when they had lost all hopes of being paid by R. & J. Phillips, and when the defendants had settled with M. de Lizardi & Co., the only agents whom they acknowledged. The Lizardis acted towards the Phillipses as principals, not as the agents of the defendants, and one of the Phillips has declared that R. & J. Phillips considered themselves as the agents of the house of Lizardi of New Orleans, and not of defendants, with whom they never communicated. Even if under the circumstances of this case there ever existed any liability on the part of the defendants towards the Newcastle manufacturing company, it appears to us that the course pursued by the latter has entirely discharged them: 7 Mart. (N. S.) 24.¹ Upon the ground of general convenience and the usage of trade, says Story in his treatise on agency, the rule has obtained that agents or factors acting for merchants resident in a foreign country, are held personally liable upon all contracts made by them for their employers; and this without any distinction whether they describe themselves as agents or not in the contract. In such cases, it is presumed that the credit is given to the agents or factors; and the ordinary presumption is not only that credit is given to the agents, but that it is exclusively given to them, to the exoneration of their employers. Still, however, this presumption is liable to be rebutted, either by proof that credit was given to both principal and agent, or to the principal only: Story on Agency, sec. 269. In this case the whole evidence shows that

1. *Williams v. Winchester.*

credit was exclusively given to the agents, admitting that R. & J. Phillips can possibly be viewed as the agents of the defendants.

Judgment affirmed.

ACTS OF SUBAGENT, WHEN BINDING: *Emerson v. Providence Hat Co.*, 7 Am. Dec. 66.

HART v. NEW ORLEANS AND CARROLLTON RAILROAD COMPANY.

[1 ROBINSON, 178.]

STOCKHOLDER OF A CORPORATION, THOUGH INCOMPETENT AS A WITNESS in its own behalf, may be called and examined by the opposite party in a suit against the corporation.

STOCKHOLDER WHO IS CALLED AND EXAMINED as a witness on behalf of the plaintiff in a suit against the corporation, may be cross-examined and testify in favor as well as against his interests upon the matters in reference to which he is called.

REPUTATION AND PUBLIC NOTORIETY ARE EVIDENCE of ownership in an action for damages for injuries caused by the negligence with which an omnibus alleged to be owned by defendants, was driven.

PLAINTIFF IS NOT REQUIRED TO SHOW BY EVIDENCE that the driver of an omnibus was not in the employ of a lessee of defendants, when the action is grounded on the alleged negligence of defendant's servant, and the answer contains a general denial only.

EMPLOYER IS LIABLE FOR THE NEGLIGENCE with which a vehicle belonging to him was driven by a servant.

RESPONSIBILITY OF MASTER FOR SERVANT'S ACT of negligence is not restricted to cases where the master is actually present and made no effort to prevent the act which caused the damage.

APPEAL. The opinion states the facts.

Roeelius, for the plaintiff.

T. Skidell, for the defendants.

GARLAND, J. This action is brought to recover eight hundred and fifty dollars as damages caused by the driver of an omnibus, alleged to be the property of the defendants, negligently running it against a carriage belonging to the plaintiff, which was standing as close to the sidewalk as it could be placed, in one of the most public streets of the city of New Orleans; whereby the carriage was broken to pieces, and nearly or entirely destroyed, and rendered useless. The evidence satisfies us that it was an act of gross negligence; the jury gave eight hundred dollars damages; and we should not hesitate to affirm the judg-

ment rendered on the verdict, if the evidence had made it probable that the omnibus was the property of the defendants. On that point the testimony does not satisfy us, and we are constrained to set aside the verdict of the jury, and remand the case for a new trial. The only evidence of property was the testimony of one witness, who says that he "saw the omnibus going along with the name of Carrollton written on it." We can not agree with the jury that this is sufficient or probable evidence of property in the defendants.

On the trial, the plaintiff offered Thomas Barrett as a witness, to prove that the defendants were the owners of the omnibus in question, to whom objection was made by their counsel, on the ground that he was incompetent, being a stockholder in the company, and that he could not be interrogated except on facts and articles, which objection was sustained by the court, and the person so offered as a witness rejected; to which opinion the plaintiff took his bill of exceptions. In this we think the judge erred. A corporation can not offer its stockholders as witnesses in its own behalf, but a party litigating with it may offer them as such, if he chooses to rely upon their statements, and they should be received. They are persons testifying against their own interest, but do not occupy the position of actual defendants, who must be interrogated on facts and articles. In a suit against a corporation all the individuals owning the stock are not cited, but only those agents and officers whom the law designates to manage its affairs; the stockholders may therefore be called as witnesses, and when once admitted, they may be cross-examined, and give evidence in favor of as well as against their interests, on those points as to which they are called to testify. Our opinion on this portion of the bill of exceptions makes it unnecessary to decide upon the other parts of it, which relate to the refusal of the judge to permit the plaintiff to amend his petition, and to propound interrogatories to Barrett.

The plaintiff then asked A. E. Crane, if it was not within his knowledge at the time the damage was done, that the defendants were generally reputed and known as the owners of the omnibus in question, and whether it was a matter of public notoriety. To these questions the defendants objected, on the ground that it was hearsay testimony. The objection was sustained, and the plaintiff again excepted. We think the judge again erred in rejecting this testimony. It was not necessary that the plaintiff should prove a legal title to the omnibus in the defendants, but only make out a *prima facie* right; and it would then rest with

them to satisfy the jury that public reputation was wrong, or to show, what would not be very difficult in a case of this kind, that the omnibus belonged to some other corporation, company, or individual.

At the time of the trial, the defendants requested the judge to charge the jury, that it should be made appear that the person driving the omnibus was in the employment of the defendants, and that they were not responsible for the acts of a driver employed by a lessee. This the judge refused, and under the pleadings and evidence before us, we think he did not err. The answer is a general denial, and it is not pretended that the omnibus had been leased or hired to any one. If the case stated had been before the court, the refusal of the judge to charge the jury as desired, might have been erroneous; but as it stands upon the record he was correct. The defendants further asked the judge to charge the jury, that a principal is not answerable for the wanton and malicious acts of his agent, which he refused to do. How far we might be disposed to assent to this as a general proposition, it is not necessary now to decide; but upon the case before us, the judge was not in error. There is no allegation in the petition that the act was wanton and malicious, nor is any attempt made to prove it; but that the damage was caused by the negligence, or want of skill in the driver, or the vicious temper of the horses, for which the defendants are responsible, if the horses belonged to them or the driver was in their service. The counsel for the defendants has seized upon a single expression in the opinion of the court in the case of *Gaillardet v. Demaries*, 18 La. 490, to sustain his position, without endeavoring to distinguish the facts and outlines of the case from the one before us.

The defendants also asked the judge to charge the jury, "that responsibility only attaches, when the master or employer might have prevented the act which caused the damage, and have not done it." This the judge refused, and we do not think that he erred. The counsel has asked that a part of the article 2299 of the code be declared to be law, without taking into consideration the sense and meaning of the whole of it. If the law were such as is alleged, a master or employer could never be made responsible for the acts of his agents or servants, unless he were present and did not endeavor to prevent the act which caused the damage.

In conclusion, we can not forbear repeating, that if the evidence of ownership of the omnibus by the defendants were ren-

dered probable we should certainly affirm the judgment, as it is necessary to let the owners and drivers of public and private carriages, and other vehicles, know that they can not with impunity violate the law, and endanger the lives and property of the people quietly passing along the public streets and highways. If the municipal authorities will not use the preventive means under their control, the citizen will hereafter know that the courts of the state are open for redress in cases of actual damage, and that those who administer the law are sensible that a serious evil must be repressed, and are ready to use the power vested in them to effect it.

The judgment of the district court is therefore reversed, the verdict of the jury set aside, and the case remanded for a new trial, with instructions to the judge to admit the testimony of Thomas Barrett and A. E. Crane, and not to give the charge to the jury asked by the defendants, and heretofore refused, and in other respects to proceed according to law; the plaintiff paying the costs of this appeal.

LIABILITY OF MASTER FOR SERVANT'S ACTS: See *Ware v. Barataria & L. O. Co.*, 35 Am. Dec. 189, in the note to which the authorities relating to this subject are reviewed at length.

MEMBERS OF CORPORATION ARE NOT COMPETENT WITNESSES IN ITS BEHALF: See *Watson v. Proprietors*, 31 Am. Dec. 42, and note containing the cases reported in this series to this effect.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MAINE.

MARTIN v. FALES.

[18 MAINE, 22.]

JURISDICTION AND POWERS OF JUSTICES OF THE PEACE are derived from statutory provisions.

GRANTING OF WRIT AND ISSUANCE OF SUBPŒNAS are the only powers that can be exercised by the justice, before the time for trial appointed in the writ. After that time arrives, if the plaintiff fails to appear and prosecute, the justice must render judgment for costs in favor of the defendant; if the defendant fails to appear, judgment must be rendered for the plaintiff; if the justice fails to appear at the time, or within a reasonable time thereafter, the suit fails, except in those cases provided for in the statute.

WHERE NEITHER JUSTICE NOR PLAINTIFF APPEARS at time and place of trial, there is a failure to prosecute, which puts an end to all further proceedings.

NOTHING LESS THAN ACTUAL RESISTANCE OR DANGER can justify a court of justice in concluding that the administration of the law is superseded, and that the course of justice must give way to lawless violence.

MERE APPREHENSION OF FUTURE DANGER WILL NOT JUSTIFY a justice of the peace in disregarding the rules prescribed by law.

APPEARANCE OF DEFENDANT, UNDER PROTEST, at a time to which an adjournment of a cause had been improperly had, can not have the effect of reviving process which had failed from the non-appearance of the plaintiff at the time named in the writ.

ERROR to reverse a judgment of a justice of the peace. The original action was brought by Fales against Martin for neglect to perform militia duty. The writ was returnable before the justice on the twenty-fourth of June, 1839. On the twenty-second of June, the justice, alleging the existence of great excitement in the neighborhood and his belief that a large armed force

had been organized to prevent by force the holding of the court, postponed the trial to the eighth of July following, and posted notices to that effect. On the eighth of July Martin appeared, and denied the power of the justice to take any further cognizance of the action, and protested against any further proceedings therein. But his objections were overruled and judgment rendered against him.

W. H. Codman, for the plaintiff in error.

J. Holmes and H. C. Lowell, for the defendant in error.

By Court, SHEPLEY, J. The jurisdiction and powers of justices of the peace, are derived from statute provisions. The statute authorizing them to hear and decide certain civil actions, c. 76, sec. 8, as well as that prescribing the form of writs, provides, that a certain time and place shall be set for the trial; and, by necessary implication, that the justice and parties shall then and there appear for that purpose; for it prescribes the duty of the justice, in case the parties do not appear, and determines the consequences which are to follow their neglect so to do. If the plaintiff shall fail to prosecute his suit, the justice is to award to the party sued his costs. And if the defendant neglects to appear, the charge in the declaration is to be taken to be true, and the justice is to give judgment against him. The justice is not authorized to perform any other duty in the case, than to grant the writ and issue subpoenas, at a different time from that set for the trial, either originally or by adjournment. Although the form of the writ requires the officer to return it to the justice on or before the day of trial, that does not give him the right to do more than preserve his writ until the time arrives, when the law empowers him to act upon it. And if the justice does not attend at the time and place of trial, or within a reasonable time after the designated hour, the suit fails, except in those cases provided for in the statute 1834, c. 101. And so the legislative department understood the law, when it made provision by that statute, that, in case of the justice's inability to attend, another justice might continue the cause. In the case of *McCarty v. McPherson*, 11 Johns. 407, it was decided, that the failure of the justice to appear within a reasonable time after the appointed hour, amounted to a discontinuance of the suit.

The phrase, "fail to prosecute," as used in the statute, points out the effect of an omission to appear for the plaintiff; and it is made the duty of the justice, in such a case, to regard the suit as discontinued, or no longer to be prosecuted, and to award

costs to the other party. In *Sprague v. Shed*, 9 Johns. 140, it was decided, that the omission of the plaintiff or any one for him to appear, was a discontinuance of his cause, and that the justice had no authority to enter judgment for him. The statutes in that state and in this are not alike, but decisions upon the effect of a neglect to comply with the provisions of law are still applicable. It does not appear from the record in this case, that the justice, or the plaintiff, or any one for him, appeared at the time and place of trial; and there was a failure to prosecute the suit, which put an end to all further legal proceedings, unless the extraordinary circumstances detailed in the record authorize a different conclusion.

It is contended, that there was an incidental or inherent power in the court to protect itself from insult and danger, in circumstances not contemplated by the law; and that it might adopt the necessary measures to provide against apprehended danger, and continue the cause for trial to a time when the danger would no longer exist. What may be the effect of an order to continue a cause, when the court is resisted, and by force prevented from attending at the time and place appointed, it is not now necessary to decide. Nothing less than actual resistance or danger, can justify a court of justice in coming to a conclusion, that the administration of the laws is superseded, and that the course of justice must give way to lawless violence. It were better, if need be, that personal suffering should be endured by the members of a court, than that the administration of the law should be yielded to an apprehension of danger, not then apparent, and that an undefined and discretionary power, suited, in his judgment, to the occasion, should be exercised by the magistrate, while he omitted to be governed by the rules prescribed by law.

The appearance of the defendant at the time named for an adjournment, can not revive the process; nor can it be regarded as a waiver of errors; for he appeared under protest, and for the purpose of insisting, that any further proceeding would be illegal. However desirable to support the proceedings to prevent any one from deriving an advantage by causing excitement, and producing alarm and the apprehension of danger, the court must regard such an evil as less than any attempt on its own part, to bend the law to circumstances, affording, at the same time, a precedent for the exercise of power not granted. It becomes unnecessary to examine the other errors assigned.

Judgment reversed.

WEEKS v. PATTEN.

[18 MAINE, 42.]

WHERE ONE HAS ELECTED TO TAKE BENEFICIAL INTEREST UNDER WILL, and has received the same, he can not afterwards set up a claim of his own, which would defeat the operation of the will.

EXCEPTIONS from the court of common pleas. Assumpsit to recover for the use and occupation of two sevenths of a house and lot occupied by the defendant. The plaintiff proved that the premises were part of the estate of Jane Robinson, deceased; that said Jane Robinson married Arthur McLellan, by whom she had seven children, of whom the plaintiff and Arthur McLellan, jun., are two; that Arthur McLellan, sen., occupied the premises by himself or tenants until his death; that Arthur McLellan, jun., after his father's death, conveyed his share in the premises to the plaintiff. The plaintiff admitted that she had accepted the provision made for her in her father's will, and that Arthur McLellan, jun., had done the same. The ninth item of the will of Arthur Lellan, sen., devised the premises in question to Thomas McLellan, a brother of the plaintiff. The third item gave to plaintiff fifteen thousand dollars, and items ten and twelve devised to her certain real estate. The judge directed a nonsuit, and the plaintiff filed exceptions.

Preble, for the plaintiff.

Adams, for the defendant.

By Court, EMBURY, J. It is contended by the defendant: 1. That no action can be maintained. 2. If any action can be sustained, assumpsit can not. The items of the will on which the defendant relies, are the third, sixth, ninth, tenth, twelfth, eighteenth, and nineteenth. The plaintiff claims the benefit of the first and eighth.

The principle, adopted in courts of equity, is, that if a person, being about to dispose of his own property, includes in his disposition, either from mistake or not, property of another, an implication arises, that the benefit under that will shall be taken on the terms of giving effect to the whole disposition. In this case it is manifest, that, independently of the will, young Arthur would have been entitled to one seventh, as heir to his mother; and as to a portion of that seventh, the plaintiff would have been entitled, as heir to her brother, had he died, had she not have become the grantee of the whole of it by his conveyance, It is clear, that if young Arthur had married, and his wife had

survived him, she would have been dowable of that seventh. For a woman shall be endowed of a seisin in law; as where lands or tenements descend to the husband, before entry he hath but a seisin in law, and yet the wife shall be endowed, albeit it be not reduced to an actual possession, for it lieth not in the power of the wife to bring it to an actual seisin, as the husband may do of his wife's land: Co. Lit. 31 a. But notwithstanding such might have been the result on such a state of facts, we have to inquire whether, under the circumstances detailed in the case, signed by the counsel, on which the nonsuit was directed, the plaintiff can sustain her action for the rent of that seventh, and for another seventh in her own right, and yet avail herself of what is given to her by the will of her father.

It is in effect insisted that acceptance binds and operates forfeiture without reference to intent. If such is the effect of acceptance, though in ignorance that it was not competent to retain both benefits, but that on taking one, the consequence of law was, she and Arthur renounced the other, then, by inadvertence, without choice, an estate might be lost. But in all cases of election, the court is anxious that a party shall not avail himself or herself of both their claims, and is desirous still to secure to him or her the option of either, not to hold them concluded by equivocal acts, performed, perhaps, in ignorance of the value of the funds or property. The rule of the court is not forfeiture, but election. And if one is bound to elect, he is entitled, first, to ascertain the value of the funds: *Wake v. Wake*, 1 Ves. jun. 335; *Whistler v. Webster*, 2 Id. 371; *Hender v. Rose*, 3 P. Wms. 124. And for that purpose may sustain a bill to have all necessary accounts taken: *Butricke v. Broadhurst*, 1 Ves. jun. 171. An election under a misconception of the extent of the funds, or claims on that elected, is not conclusive: *Kidney v. Coussmaker*, 12 Ves. 136. Was the plaintiff acting or acquiescing, cognizant of her rights? Did she intend an election? Can she restore the individual, Thomas McLellan, who forbids the defendant to pay rent but to him, the one affected by her claim, to the same situation as if her acts had never been performed, or are these inquiries precluded by the lapse of time? *Bor v. Bor et al.*, 3 Bro. P. C. 167; *Simpson v. Vickers*, 14 Ves. 341; 2 Sch. & Lef. 268.¹ In equity, the question of election, if doubtful, may be sent to a jury: *Winter v. Levensaler*,² 13 Johns. 54; 1 Swans. 360,³ and note.

In *Bor v. Bor*, 3 Bro. P. C. 167, it was held, that where a

1. *Moore v. Butler*.

2. *Winter v. Livingston*.

3. *Dillon v. Parker*.

testator, making provision for the different branches of his family, gives a fee simple estate to one and a settled estate to another, imagining that he had power so to do, a tacit condition is implied to be annexed to the devise of the fee simple estate, that the devisee thereof shall permit the settled estate to go according to the will; and if in that respect he should disappoint the will, what is devised to him shall go to the person so disappointed. It being presumed, that if the testator had known his defect of power to devise the settled estate, he would, out of the estate in his power, have provided for that branch of his family, who was not entitled to the settled estate; and have declared that no person should enjoy a legacy or devise, who controverted the power as to any benefit given to another. However salutary and equitable these rules and decisions may be in a court of equity, where these questions are usually decided, and where the grand inquiry would be, whether an election induces an absolute forfeiture or only imposes an obligation to indemnify the claimant, whom it disappoints? Whether a devisee asserting her rights to property of which the will assumes to dispose, must relinquish the whole of the benefits designed for her and her brother, or so much only as is requisite to compensate by an equivalent the provisions which she attempts to frustrate; for in that court a compulsory election will be made between inconsistent claims. Yet we apprehend that there is sufficient already before us to warrant the decision of this case at law.

It is said, that the rule of election is appropriate to every species of instrument, whether deed or will, and to be a rule of law as well as of equity. And the principal reason why courts of equity are more frequently called upon to consider the subject, particularly as to wills, than courts of law, is, that at law, in consequence of the forms of proceeding, the party can not be put to elect. For in order to enable a court of law to apply the principle, the party must either be deemed concluded, being bound by the nature of the instrument, or must have acted upon it, in such a manner as to be deemed concluded by what he has done, that is, to have elected: *Birmingham v. Kirwan*, 2 Sch. & Lef. 455. This same rule of election applies to every species of right, and even the right of dower is not protected, more than any other: 3 Leon. 272;¹ *Gosling v. Warburton and Crispe*, Cro. Eliz. 128, not overruled. Upon the principle of the doctrine in the leading cases on this subject—*Noyes et Ux. v. Mordaunt et*

1. *Butler and Baker's case*.

al., 2 Vern. 581; *Thelluson v. Woodford*, 13 Ves. jun. 209; and in 6 Cru., tit. 38, c. 2; and *Reed v. Dickerman*, 12 Pick. 146—this court has already acted. The case of *Allen v. Pray*, 3 Fairf. 188, was for dower. And it was held, that the claim of dower being inconsistent with the provisions of the will, which, so far as they were for her benefit, she had not waived, she could not maintain her action.

And in New Hampshire, in *Hamblett v. Hamblett*, 6 N. H. 333, it was held, that a party, having received a legacy under a will, shall not be permitted to contest the validity of that will, without repaying the amount of the legacy, or bringing the money into court, in conformity with the rule adopted in the English ecclesiastical court. And it was held to apply, even if the party was a minor when the legacy was received. It is true, that this was an appeal from a decree of the judge of probate, approving an instrument as the last will of David Hamblett, whereupon a trial was had before a jury, who pronounced in favor of the sanity of the testator. And the appellant moved for a new trial. A motion had been before made by the appellee, and was again renewed, for a rule on the appellant to bring into court the legacy which she had received under the will, which presented the matter as a preliminary question. The whole case is a very instructive one. "The rule is asserted to be founded in principles of justice, and seems to be sound law. And it is further said, that, in ordinary cases, when a party seeks to repudiate a will as insufficient, he must do so wholly and entirely, by refusing, until it has been established, to receive the benefit of it; or if anything has been received, by returning it to the executor, or placing it in the custody of the court, that the executor may have it, in case the judgment should be against the validity of the will."

The case of *Hyde v. Baldwin*, 17 Pick. 303, cited by the defendant's counsel, was a bill in equity to redeem a mortgage. It was held, that whether the plaintiff's right to redeem had or had not been extinguished by a foreclosure or release in the lifetime of the testator, yet, that the testator intended to remove all doubt, by requiring a release of all claims against his estate, and that the plaintiff's release in general terms, referring to the will, must be construed to embrace this right to redeem; and further, that the plaintiff, by having accepted a beneficial interest under the will, had barred himself from setting up a claim which would defeat the full operation of the will.

Severe commentaries are often made on the seeming injustice

of parents, in their last wills, as to the distribution of property among their children. Yet, perhaps, it may with safety be affirmed, that, generally, no person so well understands the real deserts of children respectively, as their parents. The irrepressible strength of paternal affection prompts them to equalize their bounty. But the manner in which that bounty shall be best brought to bear upon the permanent interest of the child, is usually most successfully indicated by the sagacity of the parent in looking profoundly into the character of the child, and providing against contingencies with almost a prophetic perception. True indeed it is, that occurrences, subsequent to the death of the testator, may show the inefficacy of his best intended safeguards. But acting upon what he knows, and sees, and feels, could he tell all which moves him in his arrangements for the welfare of his family, he might be able to satisfy the most incredulous of the justice of his designs. Even if we could reform the will in this case, the grounds upon which we should do so, should we attempt to engage in so unwelcome a service, are not before us. No inventory or the result of settled accounts in the probate office, is made part of the case. The will we have. In the argument it has been said, by the plaintiff's counsel, that on the face of the will, it bears strong marks of practice on an old broken-down man, and that the plaintiff has incomparably short of her distributive share, and Arthur, jun., is to be cut off with four hundred dollars, given in trust to H. Hilsley, to pay one hundred dollars yearly, from the paternal inheritance, and from that which descended to him from his mother. As the will is proved, we must take it that no practice was improperly exercised on the mind of the testator. Have we now before us the evidence that Arthur, jun., and the plaintiff, for the purpose of this case, have accepted the provisions for them under the will? It is most distinctly admitted.

There possibly may be some foundation for the remarks of the plaintiff's counsel. Still, we know not what was heretofore bestowed by the testator, if anything, on the plaintiff or on her husband, or what had before been done for Arthur, the son, or what were the reasons upon which the testator ordered the distribution of the estate. He certainly exercised only the freedom, which by law every other citizen could exercise with regard to the estate with which Providence had blessed him. The mere fact, that there may be some inequality in amount, is very far from impugning the just impartiality or wisdom of the dispositions of the will.

There is no suggestion of fraud or practice to induce the acceptance by Arthur or the plaintiff of those provisions. Some years have elapsed since that acceptance. We have nothing upon which we can conjecture ignorance of the value of the property by either. And under these circumstances, according to adjudged cases on subjects of this description, we must consider that the plaintiff has elected to abide by the provision of the will, that Arthur has done the same, and that the plaintiff, coming in under him, must be deemed to have notice of his situation, and is bound by his election: *Long v. Long*, 5 Ves. jun. 445. And that they are barred from their claim of the property against the provisions of the will, which would defeat its full operation.

Exceptions overruled.

Cited in *New England Car Spring Co. v. Union India Rubber Co.*, 6 Blatchf. 13, to the point that if a person accepts a beneficial interest under a will, he thereby debars himself from setting up a claim that will prevent its full operation.

ORIENTAL BANK v. FREEZE.

[18 MACE, 109.]

RETROSPECTIVE OPERATION WILL NOT BE GIVEN TO STATUTE unless the intention to give it such operation is clearly expressed.

LEGISLATURE MAY PASS LAWS THAT AOT RETROSPECTIVELY where they operate upon the remedies afforded by law for the protection of rights of property, or for the enforcement of the obligation of contracts, not upon those rights and obligations themselves.

WHERE STATUTE GIVES PARTY RIGHT TO RECOVER JUDGMENT IN NATURE OF PENALTY, for a sum larger than is justly due, the right to the amount that may be so recovered does not become vested until after judgment.

AOT OF 1839, FOR RELIEF OF SURETIES ON POOR DEBTORS' BONDS, is constitutional.

DEBT on a jail bond. The case was heard on an agreed statement of facts. The condition of the bond was that S. W. and J. Freeze had been arrested on an execution issued on a judgment in favor of the plaintiffs. In October, 1838, the debtors made application to a justice of the peace, requesting him to cite the plaintiffs to appear on the twentieth of October, 1838, to attend to the disclosure of the debtors. Notice was given to the attorneys of the creditors in this state, but no notice was given to the jailkeeper. At the time and place appointed for the hearing, the justices, having examined the notice and return,

and finding them correct, duly administered the poor debtors' oath to the debtors, and issued to them certificates of discharge. The plaintiffs contended that the act of 1839 was unconstitutional, being retrospective in its operation, and that the defendants, not having complied with the law previously in force, were liable for a breach of the bond declared on. The defendants contended that the act of 1839 was constitutional, because it did not affect the right of action, but merely changed the remedy.

Fessenden and Deblois, for the plaintiffs

Codman and Fox, for the defendants.

By Court, SHEPLEY, J. The plaintiffs insist, that the act of 1839, c. 366, ought not to receive such a construction as to affect their rights in this suit. In *Hastings v. Lane*, 15 Me. 134, it was stated to be a settled rule of construction, that a statute should not have a retrospective operation, unless the intention to have it so operate is clearly expressed. In the act of 1839, such intention is clearly expressed, and it must operate upon the claim asserted by the plaintiffs, unless there be some constitutional objection to it. The counsel for the plaintiffs contend, that the legislature can not rightfully pass a law, which operates retrospectively, and that such a law is inoperative. It has been decided, that the clause in the constitution of the United States, which provides, that no state shall pass any *ex post facto* law, or law impairing the obligation of contracts, does not prevent a state from passing retrospective laws, or laws operating upon vested rights, although a contrary opinion has been at different times intimated by some of the judges: *Satterlee v. Matthewson*, 1 Pet. 418.¹

Our constitution carefully guards the right of private property, and provides, that it shall not be taken from any one, unless the public exigencies require it. This does not, however, prohibit the legislature from passing such laws as act retrospectively, not on the right of property or obligation of the contract, but only upon the remedy which the laws afford to protect or enforce them. The legislature must necessarily possess the power to determine, by law, in what manner the person or property of a debtor shall be subjected to the demands of a creditor; and of making alterations in such laws, as a change of circumstances, or the public good, may require. And in doing this, one may be deprived of a right which he has by existing laws

1. 2 Pet. 390.

to arrest the body, or to attach, or seize a certain description of property, without infringing any constitutional provision. When a person, by the existing laws, becomes entitled to recover a judgment, or to have certain real or personal estate applied to pay his debt, he is apt to regard the privilege, which the law affords him, as a vested right, not considering that it has its foundation only in the remedy, which may be changed, and the privilege thereby destroyed. It was decided in *Potter v. Sturdivant*, 4 Greenl. 154, that the legislature might mitigate the severity of a penalty, and award to the party injured, as much as he deserved, in equity and good conscience, to receive. And in *The People v. Livingston*, 6 Wend. 526, that the legislature possessed the power to take away by statute, what was given by statute, except vested rights. And when a party, by the statute provisions, becomes entitled to recover a judgment in the nature of a penalty, for a sum greater than that which is justly due to him, the right to the amount, which may be so recovered, does not become vested till after judgment.

In *Ogden v. Saunders*, 12 Wheat. 262, Mr. Justice Washington thus states the result of his examination: "It is thus most apparent, that whichever way we turn, whether to laws affecting the validity, construction, or discharges of contracts, or to the evidence or remedy to be employed in enforcing them, we are met by the overruling and admitted distinction between those which operate retrospectively and those which operate prospectively. In all of them, the law is pronounced to be void in the first class of cases, and not so in the second." And Marshall, C. J., in the same case, 349, says: "In prescribing the evidence, which shall be received in its courts, and the effect of that evidence, the state exercises its acknowledged powers. It is likewise in the exercise of its legitimate powers, when it is regulating the remedy and mode of proceeding in its courts."

The bond in suit was taken to secure to the plaintiffs, the benefit of that part of the remedy for the recovery of a debt, which the laws afforded them by an arrest of the body of their debtor. And it was competent for the legislature to refuse any such remedy, or to impart it under such restrictions and modifications as it thought proper, and to change them at pleasure. By the act of 1839, the legislature does not impair the obligation of the contract, or deprive the plaintiffs of any vested right. It in effect provides, that a different description of evidence shall be received, as proof that the obligors have fulfilled that part of the condition of their bond which required them

to give notice of an intention to take the oath, not making it effectual, however, to bar the obligees from the recovery of such damages as they had actually suffered. The facts agreed do not prove, that the plaintiffs have sustained any damages; and by the agreement, a nonsuit is to be entered.

RETROSPECTIVE LAWS: See *Clark v. Clark*, 34 Am. Dec. 165, note 173; *Thompson v. Schlater*, 33 Id. 556; *Hepburn v. Curtis*, 32 Id. 760, note 762; *Davis v. Minor*, 28 Id. 325, note 333; *Aldridge v. Tusculum etc. R. R. Co.*, 23 Id. 307, note 319; *Peyton v. Smith*, 17 Id. 758, and note to *Bleakney v. Farmers and Mechanics' Bank*, Id. 637, where other cases in this series are collected.

THAT CONSTRUCTION OF STATUTE IS TO BE PREFERRED that best harmonizes with the constitution: *Bloodgood v. Mohawk & H. R. R. Co.*, 31 Am. Dec. 313; *Davis v. Minor*, 28 Id. 325, note 323; note to *Bleakney v. Farmers and Mechanics' Bank*, 17 Id. 637, where other cases in this series are collected.

THE PRINCIPAL CASE IS CITED in *Cohen v. Wright*, 22 Cal. 319, to the point that all statutory privileges are subject to the control of the legislature, unless they are in the nature of contracts or vested rights of property.

TUKEY v. SMITH.

[18 MAINE, 125.]

SHERIFF'S REMOVAL FROM OFFICE DOES NOT ABATE HIS RIGHT to retain possession of property previously attached by him, to await judgment and execution, nor will it exonerate him from neglecting to deliver it up to be taken under execution, after demand made for it within thirty days after final judgment.

EXCEPTIONS from the Western district court. The action was brought against the defendant, who had been sheriff, for the default of one of his deputies in failing to keep and deliver certain boards and logs that had been attached by him on a writ in favor of the plaintiffs. Plaintiffs proved a demand upon the deputy for the property, within thirty days after final judgment in the suit, and a neglect to deliver it to be taken on the execution. The defendant offered to prove that he was removed from the office of sheriff prior to the entry of judgment, but the judge rejected the testimony, and directed a verdict for the plaintiffs.

Rand, for the plaintiffs.

Willis and Fessenden, for the defendant.

By Court, EMERY, J. If the judge in the district court rejected testimony, which, if admitted, would have constituted a defense against the action, the exceptions must be sustained. it is probable the idea of taking the ground, on which the de-

defendant relies, arose from some remarks of the court in the case *Blake v. Shaw*, 7 Mass. 505. But in the present case, we must apprehend, that after the attachment was made, and while the defendant was in office, there was negligence, to the injury of the plaintiff. The law invests the sheriff with power to attach, and imposes on him the duty to keep the property attached, to respond the judgment which may be obtained in the suit. His removal from office abates nothing of his power to retain the possession of the property, which he rightfully took upon the original writ, for thirty days after judgment, for the ultimate purpose, for which he began the service. To be sure, he can not, when removed, serve an execution issuing after his removal; but the special property remained in the deputy to secure the plaintiffs in the fruits of their judgment, if seasonably required: 18 Mass. 394.¹ The offer, by the defendant, to prove that he was removed from the office of sheriff previous to the recovery of judgment in the original suit, if permitted, we think would be altogether inadequate to exonerate the defendant from responsibility for the acts and omissions of his deputy.

The exceptions are therefore overruled.

POWER AND DUTY OF SHERIFF AFTER EXPIRATION OF HIS OFFICIAL TERM.—A sheriff, who, during his term of office, has commenced the service or execution of process, is empowered and authorized to go on and complete its execution, even after the expiration of his official term: *Clerk v. Withers*, 1 Salk. 322; S. C., 6 Mod. 290; *Doe v. Donston*, 1 Barn. & Ald. 230; *Sewell's Law of Sheriffs*, 253; *Crocker on Sheriffs*, 232; *Freeman on Executions*, sec. 291; *Lawrence v. Rice*, 12 Metc. (Mass.) 527; *Welsh v. Joy*, 13 Pick. 477; *Elkin v. People*, 3 Scam. 207, ante, 541; *Bellingall v. Duncan*, 3 Gilm. 477; *People v. Boring*, 8 Cal. 406; *Allen v. Trimble*, 4 Bibb, 21; S. C., 7 Am. Dec. 726; *Purl v. Duvall*, 5 Har. & J. 69; S. C., 9 Am. Dec. 490; *State v. Roberts*, 7 Halst. 114; S. C., 21 Am. Dec. 62; *Crane v. Hardy*, 1 Mich. 56, 61; *Boas v. Nail*, 2 Metc. (Ky.) 247; *Sauvinet v. Maxwell*, 26 La. Ann. 280; *Newman v. Beckwith*, 61 N. Y. 205; *Clark v. Pratt*, 55 Me. 546; *Doolittle v. Bryan*, 14 How. (U. S.) 563; *Miner v. Cassat*, 2 Ohio St. 198; *Gibbes v. Mitchell*, 2 Bay, 120; *Cooper v. Chitty*, 1 Burr. 34.

In the case of *Clerk v. Withers*, 1 Salk. 323, Holt, C. J., said: "The old sheriff has not only authority, but is bound and compellable to proceed in this execution; for the same person that begins an execution shall end it, and a *distingas nuper vicecomitem* lies. Of these there be two sorts; one is to distrain the old sheriff to sell and bring in the money; the other to sell and deliver the money to the new sheriff to bring it into court: which plainly shows his authority continues by virtue of the first writ." This doctrine is universally accepted in this country as the doctrine of the common law on this subject. In the case of *Lawrence v. Rice*, 12 Metc. (Mass.) 533, Shaw, C. J., delivering the opinion of the court, said: "It seems to be a well-settled rule of law, a rule of the common law, recognized and confirmed by statute, that when an executive officer has begun a service, or commenced the per-

1. *Bond v. Padesford*.

formance of a duty, and thereby incurred a responsibility, he has the authority, and indeed is bound, to go on and complete it, although his general authority, as such officer, is superseded by his removal, or his derivative authority terminated by the termination of the office of his principal. His authority attaches by the commencement of the service, and will be superseded only when it is completed, whether it be a longer or a shorter time." The principles here stated are fully sustained by the American authorities above cited. And in *Smith v. Bodfish*, 39 Me. 136, it was decided that a deputy sheriff who attaches property on meane process, is bound to keep it for thirty days after the judgment, and deliver it on demand to any officer having the execution, and authorized to receive it, notwithstanding he ceased to be a deputy after the attachment and before judgment.

LIABILITY FOR NEGLECT TO COMPLETE EXECUTION.—As the ex-sheriff has the power to complete the execution of all process which he had as sheriff begun to execute, so he is liable for failure or neglect to perform his duty in this respect: *State v. Roberts*, 21 Am. Dec. 62. And where a deputy sheriff attached goods on a writ, and afterwards neglected to deliver them, when legally demanded, to satisfy the execution, the sheriff was held liable for this neglect of duty on the part of his deputy, although at the time it happened neither he nor his deputy was in office: *Morse v. Betton*, 2 N. H. 184. But in *Newman v. Beckwith*, 61 N. Y. 205, it was decided, that where a sheriff dies and his under-sheriff goes on and completes the unexecuted process, the latter will be liable for his own negligence, not the personal representatives of his deceased principal.

WHERE SHERIFF HAS LEVIED ON PERSONAL PROPERTY, all the authorities agree, that he not only may, but must go on and sell the property levied upon and apply the proceeds to the satisfaction of the judgment, even after he has gone out of office. And a considerable number of cases hold that there is no distinction in this respect between levies upon personal property and levies upon real estate. According to these authorities, a sheriff who, during his term of office, has levied upon real estate, is the proper person to sell it, although he may have gone out of office, and also to execute the deed therefor to the purchaser: *Lofland v. Ewing*, 5 Litt. 42; S. C., 15 Am. Dec. 41; *Lemon v. Craddock*, Lit. Sel. Cas. 251; S. C., 12 Am. Dec. 301; *Purl v. Duvall*, 5 Harr. & J. 69; S. C., 9 Am. Dec. 490; *Allen v. Trimble*, 4 Bibb, 21; S. C., 7 Am. Dec. 726; *Edwards v. Tipton*, 77 N. C. 222; *Jackson v. Collins*, 3 Cow. 89; *Coyles v. Higgins*, 1 Duv. 7; *Evans v. Ashley*, 8 Mo. 183; *People v. Boring*, 8 Cal. 406; *Anthony v. Wessel*, 9 Id. 103. And in the case last cited it was decided, that the new sheriff could not execute the deed, where the sale was made by his predecessor. One reason given for the rule, that an ex-sheriff must go on and complete the execution of process which he has begun to execute, is, that "an execution being an entire thing, he who begins it must end it:" *Purl v. Duvall*, 9 Am. Dec. 491. In case of a levy upon personal property, another reason, and, it seems to us, a better one, is, that by the levy the officer acquires a special property in it, which continues after his removal from office. Now, as this latter reason does not apply in case of a levy upon real estate, some of the American courts have held that the new sheriff is the proper person to make the sale and to execute the conveyance: *Bellinghall v. Duncan*, 3 Gilm. 477; *Bank of Tennessee v. Beatty*, 3 Sneed, 305; *Clark v. Sawyer*, 48 Cal. 133; *Leshey v. Gardner*, 3 Watts & S. 314.

In discussing this subject, Treat, J., in delivering the opinion of the court in *Bellinghall v. Duncan*, 3 Gilm. 480, after referring to the rule in reference to levies on personal property, said: "There is an essential difference in the

case of a levy on real estate. The land remains in the possession of the debtor, not only until the day of sale, but until the time allowed him by law to redeem has expired; and even then the sheriff can not divest him of the possession, but the purchaser is driven to his action of ejectment to recover it. The common law authorities being confined to sales of personal property, we consider ourselves at perfect liberty to adopt such rule in relation to sales of land on execution, as we may deem best adapted to the circumstances of the country and the interests of its citizens. There seems to be no good reason why the sale should be confined exclusively to the sheriff making the levy; but, on the contrary, there are some cogent reasons why his successor should be permitted to do it. It is wholly immaterial to the debtor which of them is to make the sale. He is equally protected in either case. Much inconvenience may arise if the new sheriff is not allowed to complete the service of the process commenced by his predecessor. The old sheriff may die or remove from the bailiwick before he has sold the land, and if his successor is not allowed to make the sale, the creditor may be greatly delayed and injured in his remedy. In order to give the new sheriff any authority to collect the judgment, he might be compelled to have the levy set aside, and in that way lose the benefit of the lien acquired by the levy. His lien might be defeated for the want of an officer authorized to enforce it. In the case of a levy on personal property, the creditor might have a remedy on the official bond of the sheriff; but in the case of a levy on land, he might have no effectual remedy. We are disposed, therefore, to decide that the new sheriff may sell real estate levied on by his predecessor in office. The sale by either would be valid. Where the execution has been returned with an indorsement of a levy on real estate, and the creditor desires a sale, he may at his election sue out a *venditioni exponas*, directed to either the sheriff who made the levy, or his successor in office. Where the sheriff retains the custody of the execution, the *vendi* should be directed to him; or the creditor may procure the return of the process, and then direct the *vendi* to the new sheriff. It is the opinion of the court that the sheriff in office when the sale took place, had ample authority to make it, and that his deed vested in the purchaser whatever title the judgment debtor had in the premises at the date of the levy." The following authorities hold that the process, in the case of real estate, may be executed either by the old or the new sheriff: *Holmes v. McIndoe*, 20 Wis. 689; *Sumner v. Moore*, 2 McLean, 59; *Tarkinton v. Alexander*, 2 Dev. & B. 87.

At common law, real estate was not subject to sale on execution, and therefore the doctrine we have been considering could have no application to it. In 1833, a statute was passed in England, providing that, on going out of office, the old sheriff should deliver to the incoming sheriff all writs and other process not wholly executed, and that the latter's receipt therefor should be a good and sufficient discharge of and from the further charge of the execution of such writs and process: 3 and 4 Wm. IV., c. 99, sec. 7. In Missouri, it is provided by statute that the sheriff who levies may turn over the writ to his successor, or retain it and go on with the sale: *Kane v. McCoun*, 55 Mo. 181. And in North Carolina the statute provides that, where a sheriff, or coroner, has sold real or personal estate, and goes out of office before executing conveyances, he may execute the same after his office expires, and, if he dies or removes from the state, his successor shall execute them. But it seems, independent of statute, that where a sheriff has levied upon property, and dies before the sale, his personal representative may make the sale: *Read v. Stevens*, Cox, 264; *Sanderson v. Rogers*, 3 Dev. L. 38.

OSGOOD v. DAVIS.

[18 MAINE, 146.]

PAROL EVIDENCE IS NOT ADMISSIBLE TO ADD TO OR VARY THE MEANING of the terms of a written contract; and can not, therefore, be received for the purpose of showing that a written assignment on the back of a certificate of stock in a corporation, of "all the right, title, and interest" of the assignor, was accompanied by a warranty of good title.

EXCEPTIONS from the Western district court. The declaration alleged that the defendant had undertaken and promised to convey and assign to the plaintiff one share of the capital stock of a stage company, and twenty fifty-fifths of another share, and that he did make and execute a pretended conveyance and assignment thereof, but that at the time of said pretended assignment, said defendant was not the proprietor of said shares, the same having been long before sold to another person to pay assessments. The form and effect of the assignment and written contract sufficiently appear from the opinion. The plaintiff offered to prove by parol all the allegations set forth in his writ, but the judge rejected the offer, and directed a nonsuit, to which the plaintiff excepted.

Eastman and Howard, for the plaintiff.

Carter, for the defendant.

By Court, SHEPLEY, J. The rule of law which excludes parol evidence, tending to contradict or vary a written contract, may sometimes permit the crafty to take advantage of the ignorant and negligent; but the propriety of adhering to one of so much importance and usefulness, is but little lessened by such a consideration. The writing on the back of the certificate of share numbered seventy, signed by the defendant, does not purport to sell or assign the share itself, but only the right, title, and interest which the defendant had to the share. It is such a writing as one, who had held the share only for a special purpose, and who, after that purpose had been accomplished, intended to part with whatever of title he received, might properly sign. It would seem to have been drawn with the design to exclude any inference, that he warranted the title to the share, for it is language become familiar by being frequently used in conveyances, where there is no intention to warrant the title. Parol evidence is inadmissible to prove the intention of the parties to have been different from that expressed in writing, and thereby to alter the legal operation of a written instrument.

In *Powell v. Edmunds*, 12 East, 6, such evidence, tending to

prove, that an auctioneer warranted, that a lot of timber, described in the written conditions of sale, would amount to eighty tons, was excluded. And in *O'Harra v. Hall*, 4 Dall. 340, where a bond was assigned in general terms, it was decided, that parol evidence could not be received to prove, that the assignor agreed to guarantee the payment of it. To admit parol evidence in this case to prove, that the bargain was for a good title, would be, to change the apparent intention of the parties, as disclosed in their written contract, as well as to vary and alter the legal construction of it. This case is not like that of a sale by a bill of parcels. Such a writing was considered, in *Bradford v. Manly*, 13 Mass. 142 [7 Am. Dec. 122], as designed to state the fact simply, that a sale had been completed, without intending to state the terms of the contract, and the parol evidence was not regarded as contradicting or varying the act of the parties existing in writing. To permit the parol evidence offered in this case, would be like permitting it to vary the quantity or description of goods contained in a bill of parcels.

The contract relating to share numbered eighty, states, that a part of it had been sold; and it then proceeds to state, specifically, the obligations which the defendant assumed in relation to it. A sale, in the proper sense, could not have been intended, for no actual transfer of a part could take place. The share could not be divided, nor could the plaintiff control or sell the portion. The design must have been, to give the plaintiff the beneficial interest in a part, and the terms upon which the defendant became liable to account for that beneficial interest, are stated in the contract. In attempting to make the defendant account to him for that interest upon different terms, the plaintiff must meet difficulties similar to those, which have been stated, respecting the sale of the other share. In stating the offer to prove, by parol evidence, all the allegations set forth in the writ and declaration, it must have been understood, that the money count was for the same cause of action as the other counts, and there would exist the same objections to a reception of the testimony under that, as under the other counts.

The testimony was not offered to prove, that the defendant knowingly made false and fraudulent representations in relation to the title, to induce the plaintiff to enter into these contracts.

Exceptions overruled.

PAROL EVIDENCE IS NOT ADMISSIBLE TO VARY WRITTEN AGREEMENT: *Foley v. Cowgill*, 32 Am. Dec. 49; *Jones v. Hardesty*, Id. 180; *Hale v. Hewitt*, 27 Id. 289, note 295, where other cases on this subject in the series are collected.

PALMER v. YORK BANK.

[18 MAINE, 166.]

DECLARATION IN PENAL ACTION SHOULD ALLEGE that the facts charged are against the form of the statute upon which the action is based.

STATUTE GIVING FOURFOLD INTEREST BY WAY OF DAMAGES IS PENAL in its character; but where the damages are given to the party injured, who seeks recovery of a just debt to which the increased damages are made an incident, such action is not properly to be regarded as a penal one.

WHERE STATUTE GIVES PENAL DAMAGES TO PARTY INJURED, in a case where he had before a remedy at common law, if he claim such damages, he must do so by a reference to the statute.

ONE WHO WOULD HOLD BANK LIABLE FOR PENAL DAMAGES, given by statute for neglect to make payment in specie, on demand or within the time limited, must distinctly claim such damages in his declaration.

PLAINTIFF WILL NOT BE ALLOWED TO AMEND HIS DECLARATION after the defendant has been defaulted and the cause has been argued upon the existing counts.

ACTION brought to recover fourfold interest by way of damages, against the defendants, for neglecting to pay gold or silver for certain bills of theirs, on demand. The declaration contained one count for money had and received, and several other counts, setting forth the bills of the bank, and alleging presentments thereof at the bank at different times during the suspension of specie payments by the New England banks in 1837 and 1838. A few days prior to the resumption of specie payments by those banks, the bank tendered to the plaintiff the amount of the bills and six per cent. interest, together with a sum to cover any expenses. The plaintiff refused to receive the money and brought this action. The money tendered was brought into court on the first day of the term. The defendants were defaulted, and entered a prayer to be heard in damages. The plaintiff took the money out of court, claiming a further sum to the extent of twenty-four per cent. per annum. The other facts sufficiently appear from the opinion.

Preble, for the plaintiff.

Mellen and J. Shepley, for the defendants.

By Court, WESTON, C. J. In none of the counts in the plaintiff's declaration, is there any reference to the statute, upon which he claims to be allowed fourfold interest by way of damages. If this falls within the class of penal actions, the current of authorities requires that the facts charged should be averred to be against the form of the statute upon which it is based. The statute, upon which the plaintiff relies, calls the twenty-four

per cent. damages it imposes a penalty. A similar statute in Massachusetts is called by the court highly penal, in the case of *The Suffolk Bank v. The Worcester Bank*, 5 Pick. 106. As it gives four times as much damage as is allowed by law for the detention of the other debts, it is certainly penal in its character. But as it is given to the party injured, who seeks the recovery of a just debt, to which these increased damages are made an incident, we are not satisfied that it is to be regarded properly as a penal action. In *Reed v. Northfield*, 13 Id. 96 [23 Am. Dec. 662], a similar point was raised, and the authorities bearing upon the question were examined, to which we refer, without deeming it necessary to cite them in detail. Shaw, C. J., who delivered the opinion of the court, takes a distinction between an action brought for damages given by statute to the party injured, and an action for a statute penalty, *eo nomine*. The action then under consideration, was for double damages, sustained by a defect in the highway. The chief justice says: "In the present case, we think the action is purely remedial, and has none of the characteristics of a penal prosecution. All damages for neglect or breach of duty, operate to a certain extent as punishment; but the distinction is, that it is prosecuted for the purpose of punishment, and to deter others from offending in like manner." And it was held by the court that the averment that upon the facts charged, and by "force of the statute in that case made and provided," the town became liable, was sufficient.

In *Bayard v. Smith*, 17 Wend. 88, which was an action for damages by the party injured by false weights, given by statute, the court held a general reference to the statute sufficient. And in a note by the reporter, he states that a general reference is all which can be required in such cases. If this is necessary, where the action is founded altogether on a public statute, of which the court take judicial notice, it would seem to be still more necessary, where there is also a concurrent remedy at common law. In trespass by one tenant in common against another for treble damages, a reference to the statute, which imposes them, has always been deemed indispensable. So in actions against the sheriff for fivefold interest, for not paying over money collected on demand, averments of his liability to this extent under the statute, are inserted in the declaration. And wherever penal damages are given by statute to the party injured, where he had before a remedy at common law, we are of opinion, that if he would claim the statute damages, the

weight of authority requires, that he should do so by a reference to the statute. If the plaintiff had averred the liability of the defendants to pay the fourfold interest, we should have been more strongly inclined to have got over this technical objection. But he sets up no such liability. The legal assumpsit, upon which he declares is, that in consideration of the previous averments, the defendants promised to pay each bill, according to its tenor. Facts are set forth, upon which a liability to increased damages under the statute might arise, but such liability is not charged, nor any such claim made by the plaintiff.

With every disposition to sustain a law, which has been deemed wise and salutary, and has repeatedly received the sanction of the legislature, both in Massachusetts and in this state, we feel constrained to decide, that if a plaintiff would avail himself of its provisions, he should set forth distinctly and affirmatively the extent of his claim. How much forbearance the holders of bills might reasonably be expected to practice, under peculiar circumstances, each must decide for himself; but if he would hold a bank to the payment of the penal damages, given by statute, it can not be regarded too much to require, that he should distinctly claim them in his declaration. If he does not, it is not unreasonable, that he should be restricted to the measure of damages, which the law accords to other creditors.

In *The Suffolk Bank v. The Worcester Bank*,¹ a question was presented about the penal damages. The declaration contained only a count for money had and received; but it was submitted to the court upon a case stated. Their attention was not called to the form of declaring.

The plaintiff has moved for leave to amend, if necessary. We do not deem it reasonable to grant it in this stage of the proceedings. The defendants have been defaulted upon the declaration, as it stood. The plaintiff has been paid principal and legal interest. The case has been argued upon the existing counts. And we do not feel justified in allowing them to be amended.

IN PENAL ACTIONS AVERMENT THAT ACT WAS DONE AGAINST FORM OF STATUTE is necessary: *Reed v. Northfield*, 23 Am. Dec. 662.

NICHOLS v. PATTEN.

[18 MAINE, 231.]

SALE OF PERSONAL PROPERTY IS COMPLETE, and no subsequent formal delivery thereof is necessary, where, from the date of the bill of sale, the property continued to be on land, or in buildings, in the exclusive possession and control of the vendee.

CONVEYANCE TO DEFAUD CREDITORS IS BINDING on the parties thereto, who can not set up, against each other, the fraud on the creditors; and the vendee who loses his title by the acts of the vendor may recover against him. The vendor may, therefore, be a witness either to defeat or to sustain such conveyance, his interest being a balanced one in either case.

TO CONSTITUTE ATTACHMENT, OFFICER NEED NOT ACTUALLY HANDLE the goods attached; but he must be in view of them, with the power of controlling them, and of taking them into possession.

RETURN OF OFFICER, WHERE HE IS A PARTY, is merely *prima facie* evidence of an attachment.

TO PRESERVE ATTACHMENT, OFFICER MUST RETAIN HIS CONTROL and power of taking immediate possession. If he fails to do this, the attachment will be regarded as abandoned.

MERE REQUEST MADE BY OFFICER TO A PERSON TO GIVE NOTICE that property has been attached, is not sufficient to show that he acted for the officer, unless he consented to assume the trust of taking charge of the property for him.

PROPERTY UNDER ATTACHMENT MAY BE CONVEYED BY THE DEBTOR, subject to the attachment. And any merely formal act of delivery which does not interfere with any right of the officer in relation to the property, will not subject the purchaser to an action by the officer.

ANY ACT WHICH DEPRIVES OFFICER OF CONTROL OF ATTACHED PROPERTY will subject the person who does it to an action for such property.

FRAUD WILL NOT BE PRESUMED, and the burden of proof to establish it is upon the party who alleges it.

TRESPASS for a quantity of saw-mill gearing. The plaintiff called one Wheeler as a witness, who testified that he met the plaintiff on the morning of January 16, 1837, coming from the mill where the property in question then was; that plaintiff told him that he had attached the property there, and requested him to forbid any one to take the things away; that witness did not promise to do so; that he was not appointed keeper of the property; that he did not receipt for it nor promise to keep it; that he worked about the mills until February 4, when he left. The other facts sufficiently appear from the opinion. The verdict was for the plaintiff, subject to be set aside.

J. W. Bradbury and Tullman, for the defendants.

Mitchell and Groton, for the plaintiff.

By Court, SHEPLEY, J. Both parties claim the property under

William R. Rogers; the defendants as purchasers by a bill of sale executed on the fourteenth of January, 1837, and the plaintiff by an attachment made by him as a deputy sheriff on several writs on the sixteenth of the same month. It appears from the testimony, that the property was on the land or within buildings belonging to the defendants, and that after the bill of sale Rogers no longer had possession or control of the lands or buildings, but that they were within the exclusive control of the defendants or their agent. The sale was therefore complete before the attachment, and the formal delivery or marking on subsequent days was unnecessary: *Carrington v. Smith*, 8 Pick. 419. Their title would be good if the sale was *bona fide* and for a valuable consideration. This was denied and the plaintiff called Rogers as a witness, and he being objected to was permitted to testify, that the design in making the bill of sale was to prevent an attachment of the property by his creditors. Rogers, having on the twenty-fourth of March preceding entered into a contract to build a dam and mills for the defendants, had proceeded to accomplish the undertaking, and had received advances earlier and beyond the amount due, and made the bill of sale of the materials provided, as the defendants allege, to secure them for such advances. The position of the witness was like that of a vendor of personal property, who having received his pay for it, testifies to a fraud between himself and the vendee, and thereby enables his own creditors to apply the property to the payment of his debts, thus securing to himself the benefit of it twice. It is said, that his interest is still balanced because he thereby incurs a new liability to the vendee, who may recover of him on the contract of sale the value of the property.

In the case of *Bailey v. Foster*, 9 Pick. 139, it was decided, that one thus situated would not be a competent witness for the purpose of proving the fraud. The decision appears to rest upon the position that the vendor having received payment, and testifying in such a manner as to enable his creditor to apply the property to the payment of his debts, obtains the value twice; without noticing that he would thereby incur a liability to refund to the vendee. In the case of *Rea v. Smith*, 19 Wend. 293, it is admitted, that such liability would arise, but it is denied that he would be a competent witness, because it is said the vendee could not recover against him on the contract of sale for two reasons: 1. Because his title would not be destroyed by one paramount and so the case would not come within the warranty; and 2. Because to make out his case against the vendor he must

necessarily prove a fraud in both the parties to the contract and thereby place himself *in pari delicto*. When a creditor recovers against the vendee, he does so because the law regards him as having the better title. And the vendee loses his title through the fault of the vendor in neglecting to pay his debt and thereby extinguishing the creditor's prior right to have the property applied in payment of it. It is not clearly perceived why the creditor's should not be regarded as the paramount title; or why the vendor, who has caused the title of the vendee to be defeated, has not by that act violated his contract assuring the title to the vendee. If this be the true position of the parties, the first objection would prove insufficient to prevent a recovery. The second objection is to be examined. The statute of 13 Eliz., c. 5, from which we derive our law respecting conveyances fraudulent as against creditors, provides, that only against creditors and others whose actions shall thereby be defrauded or delayed, they shall be of none effect; leaving them impliedly valid as respects the parties to them. The case of *Hawes v. Leader*, Cro. Jac. 270; S. C., Yelv. 196, decided that the deed remained good against the parties, though void as to creditors. And this was recognized as a correct exposition of the statute in the case of *Osborne v. Moss*, 7 Johns. 161 [5 Am. Dec. 252].

In *Drinkwater v. Drinkwater*, 4 Mass. 357, Parsons, C. J., says: "A conveyance to defraud creditors is good against the grantor and his heirs, and is void only as to creditors. For neither the grantor nor his heirs claiming under him can avail themselves of any fraud to which the grantor was a party to defeat any conveyance made by him. The intention of the law in establishing this principle is effectually to prevent frauds by refusing to relieve any man or his heirs from the consequences of his own fraudulent act." In *Randall v. Phillips*, 3 Mason, 388, Mr. Justice Story, speaking of such a conveyance, says: "It is good as between the parties, and binds them and their privies. It may be avoided by any third persons, whose interests are intended to be defeated by it, but it is not absolutely void. The general doctrine is, that a conveyance in fraud of the law binds parties, and can not be acted upon, so far as respects them as a nullity." According to these authorities the conveyance remaining good and binding upon the parties to it, they can not set up the fraud upon creditors against each other, and the doctrine *in pari delicto*, does not apply; and the vendee losing his title by the acts of the vendor may recover against him. The vendor

therefore may be a witness as well to defeat as to sustain the conveyance, his interest being a balanced one in either case.

To constitute an attachment, it is not necessary that the officer should handle the goods attached, but he must be in view of them with the power of controlling them and of taking them into his possession. And in case of an attempt by another to interpose or take possession, he should take such measures as to prevent it, unless resisted. The return of an officer where he is a party is *prima facie* evidence, and only so, of an attachment: *Bruce v. Holden*, 21 Pick. 187; *Sias v. Badger*, 6 N. H. 393. To preserve an attachment when made, the officer must by himself or his agent retain his control and power of taking immediate possession in all those cases in which the property is capable of being taken into actual possession, unless our statute establishes, as it does in certain cases, a different rule. If he does not do this, the attachment will be regarded as abandoned and dissolved: *Sanderson v. Edwards*, 16 Pick. 144.

The application of these principles to the present case, as now presented by the testimony, would decide that the attachment might be sufficient, if followed by the continual presence of the officer or of some one on his behalf. There is no evidence of any continued control or of any attempt to retain it, unless Wheeler can be considered as undertaking to act for the officer. The mere request to Wheeler to give notice would not be sufficient unless he consented to assume the trust of taking charge of the goods for the officer. His acts and declarations taken together place him in a position so equivocal that the jury should decide whether he did consent to act for the officer, and if so to what extent he did so act and continue the officer's control over the property. There can be no doubt that he ceased to have any such connection with it as would preserve the attachment after the fourth of February following. If the defendants had not interfered against the rights of the officer or his keeper before that day, the plaintiff can not recover. And so far as they had before that time resisted and taken from his or his keeper's control any of the property, to such extent he may recover. It becomes therefore proper to examine their acts in relation to the property after the attachment. An attachment does not deprive the debtor of the right to convey his property subject to it, and any merely formal act of delivery, which does not resist or deprive the officer of the actual control of it, is no violation of his rights, and will not sub-

ject the purchaser to an action by the officer. It does not occasion any injury or deprive him of any right: *Bigelow v. Willson*, 1 Pick. 492. Nor would the continued operations of the mechanics upon the property, if not objected to by the officer or his keeper, be considered as a trespass against him. But any act whatever which deprived the officer or his keeper of the control or removed any portion of the property from the place where he chose to have it deposited, would subject them to an action for such property. The principle that fraud is not to be presumed and that the burden of proof to establish it is upon the party alleging it, was recognized by the court in the case of *Blaisdell v. Cowell*, 14 Me. 370.

It is not perceived that the court can properly come to any more definite conclusion upon the rights of the parties without the assistance of a jury, to which the matters of fact must again be submitted. Verdict set aside and a new trial granted.

Cited in *Harvey v. Varney*, 98 Mass. 121, as overruling *Smith v. Hubbs*, 1 Fairf. 71.

FRAUDULENT CONVEYANCE IS GOOD, except as against the grantor's creditors: *McGee v. Campbell*, 32 Am. Dec. 783.

ATTACHMENT, LEVY OF, WHAT SUFFICIENT: See *State v. Poor*, 34 Am. Dec. 387; *Trevillo v. Tilford*, 31 Id. 484, note 489, where other cases in this series are collected.

FRAUD IS NOT TO BE PRESUMED: *Davis v. Calvert*, 25 Am. Dec. 282; and burden of proving it is upon him who alleges it: *Towsey v. Shook*, Id. 103.

NEWALL v. HUSSEY.

[18 MAINE, 249.]

BY TAKING NEGOTIABLE PROMISSORY NOTE FOR DEBT DUE ON ACCOUNT, the debt is, in this state, considered as paid, and the contract extinguished. The note, in such case, is evidence of a new contract, unless the contrary appears, and must be a new cause of action.

AMENDMENTS INTRODUCING NEW CAUSE OF ACTION are not permitted in our practice. And although the allowance of amendments, in cases where they are allowable by law, rests in the discretion of the judge of the district court, and will not be revised by this court, yet if the judge allow an amendment which the law does not authorize, the party affected has a right to except.

EXCEPTIONS to the Middle district court. The declaration was only on an account annexed to the writ. After the action had been entered, and several times continued, the plaintiff, under general leave to amend, offered as amendments: 1. The money

counts; 2. *Insimul computassent*; 3. A count on a note given by the defendant to the plaintiff. The judge allowed the plaintiff to file a count for money had and received, and one upon the note, and to this allowance the defendant excepted.

J. S. Abbott, for the defendant.

Reed, for the plaintiff

By Court, SHEPLEY, J. By the law of this state, a debt due on account is considered as paid, and the contract extinguished by taking a negotiable promissory note for the amount. While the common law regards it only as security for an existing debt, the note is here evidence of a new and different contract, unless the contrary is made to appear. The letter of the defendant, under date of the twenty-first of November, does admit that the note originated from the account sued; it does not, however, rebut, but rather confirms the presumption of law, that it was received in discharge of the previous contract. If the original contract no longer existed after taking the note, it would seem to follow that the note must be a new cause of action. And so it has been decided to be in Massachusetts, where the like rule of law prevails: *Vancleef v. Therasson*, 3 Pick. 12. In our practice, amendments are not permitted to introduce a new cause of action. It is within the discretion of the judge of the district court to permit amendments in all cases where by law the writ or declaration is amendable; and this court does not revise that exercise of discretion. But if an amendment be permitted, which the law does not authorize, the party has a right to except. This amendment must be regarded as unauthorized, because it introduces a new cause of action.

Exceptions sustained, and plaintiff nonsuited.

TAKING NOTE FOR PRE-EXISTING DEBT: See *Estate of Davis*, 34 Am. Dec. 574; *Homes v. Smyth*, 33 Id. 650, note 652; *Hutchins v. Olcott*, 24 Id. 634, note 640, where other cases in this series are collected.

AMENDMENT CHANGING CHARACTER OF ACTION NOT ALLOWED: See *Emerson v. Wilson*, 34 Am. Dec. 695, note 697. where other cases are collected.

PHILBRICK v. PREBLE.

[18 MAINE, 255.]

AWARD NOT IN WRITING MAY BE GOOD UNLESS IT INVOLVES TITLE to real estate, but if it does involve such title it is void.

WHERE PART OF AWARD IS GOOD AND PART IS VOID, the whole will be treated as void, if the void part and the good part are so connected that justice might not be done by permitting the latter to have effect.

EXCEPTIONS from the Middle district court. Trespass for an assault and battery. The plaintiff, by consent, became nonsuit, with leave to file exceptions. The other facts sufficiently appear from the opinion.

Rundlett, for the plaintiff.

F. Allen, for the defendant.

By Court, *SHEPLEY, J.* It appears from the bill of exceptions, that the dividing line between the lands of the parties had been in dispute; that the plaintiff attempted to remove a part of the fence on to land occupied and claimed by the defendant; and that this occasioned a personal conflict. The parties agreed by a writing under their hands and seals to refer "all disputes and quarrels or differences that now exist respecting the establishing the line or partition fence," and all other disputes, to referees. The referees thus selected heard the parties, decided upon the line, and made their award verbally to the parties, with which they declared themselves satisfied. If the award had been in writing, it might have bound the parties, although it decided upon a difference respecting real estate. And an award not involving the title to real estate may be good without being reduced to writing; but the title to real estate can not be affected by any agreement or award not in writing. If the award was void as to so much of it as related to the real estate, the court can not decide that it was good so far as it related to the personal injury; because one or the other of the parties might be more or less in the wrong according to the decision which should be made respecting his title to the real estate. When the part of an award, which would be otherwise good, is so connected with that which is void as to show that justice might not be done by permitting it to have effect, the whole will be void.

Exceptions sustained.

Cited in *Byam v. Robbins*, 6 Allen, 65, to the point that title to real estate can not be affected by any agreement or award not in writing.

PAROL AGREEMENT TO SUBMIT TO ARBITRATORS question touching title to lands can not be enforced: *Stark v. Cannady*, 14 Am. Dec. 76.

HARRINGTON v. FULLER.

[18 MAINE, 277.]

SHERIFF IS RESPONSIBLE FOR ALL OFFICIAL ACTS OF HIS DEPUTY, but not for neglect of any duty which the law does not require him officially to perform.

SHERIFF REMAINS LIABLE FOR PROPERTY WRONGFULLY TAKEN BY HIS DEPUTY, and sold, so long as the property in the goods taken or the money received from their sale remains unchanged. But when the owner of the goods sues the deputy for the trespass, recovers judgment, and takes out execution against him, the property in them becomes changed, and the deputy no longer holds in his official capacity, but in his own absolute right, and the sheriff is no longer responsible.

CASE against the defendant as late sheriff, for default of his deputy. The deputy attached and sold certain goods belonging to the plaintiff. The plaintiff sued the deputy for the trespass, recovered judgment, and took out execution against him, and a portion of the judgment was paid. This action was brought to recover the unpaid balance from the defendant. There was no evidence to show that the defendant had had any connection with the action brought by the plaintiff against the deputy. The plaintiff had never made any demand for payment from the defendant until the day before the suit was commenced.

Abbott and E. W. Furley, for the plaintiff.

H. O. Lowell, for the defendant.

By Court, **SHEPLEY, J.** It is admitted that the plaintiff can not recover on the first count for taking his goods. If there were no other objection, the statute of limitations is a perfect bar. He claims to recover on the second count for the neglect of the deputy to satisfy the judgment recovered against him. The sheriff is responsible for all official neglect or misconduct of his deputy; and also for his acts not required by law, where the deputy assumes to act under color of his office. He is not responsible for the neglect of any act or duty which the law does not require the deputy officially to perform: *Knowlton v. Bartlett*, 1 Pick. 270; *Cook v. Palmer*, 6 Barn. & Cress. 739. It is said, that the deputy held the money received for the goods in his official capacity, and of course, that his neglect to pay it over in satisfaction of the judgment recovered against him was an official neglect. While the property in the goods or moneys received by the sale of them remained unchanged, the deputy held them in his official capacity. After the plaintiff had recovered judgment against him in trespass, and had taken out execution and collected a part of the amount so recovered, the property was changed. It was no longer held in an official character. It became a part of his own estate.

The defendant would be liable for the original act of taking, and also for any neglect to keep safely so long as the property

remained unchanged; but after that time the deputy might do what he pleased with his own, and his superior would have no right to take it from him, or to complain of his acts respecting it. There being no money in his hands after that time, held in his official capacity, his neglect to pay it over was not an official neglect, for which the defendant is liable. The counsel for the plaintiff would avoid this conclusion, by urging that the right of property was transferred to the deputy in his official character, and that placed a fund in his hands in the like character to pay the judgment recovered against him. He could not, however, in his official capacity acquire the absolute property in the goods. It is the act of the plaintiff, not the act of the law alone in connection with his own acts, which has occasioned his becoming the owner in absolute right of property. The plaintiff can not, by his own voluntary act, transfer the property from himself to the deputy, and still insist that such absolute property is held in an official capacity. As soon as the special property, which he held as an officer, was, by the election of the plaintiff, changed into an absolute title against all persons, the custody ceased to be official. The debt due for it became his own private debt by the plaintiff's own election; and the defendant ceased to be responsible for any after act or neglect of the deputy.

Plaintiff nonsuit.

SHERIFF'S LIABILITY FOR HIS DEPUTY'S ACTS: See *Foraythe v. Ellis*, 20 Am. Dec. 218, note 223, where other cases in this series are collected

JOHNSON v. WHITEFIELD.

[18 MAINE, 286.]

CITIZENS HAVE RIGHT TO TRAVEL OVER WHOLE WIDTH OF HIGHWAY without being subjected to other or greater dangers than may be presented by natural obstacles, or those occasioned by making and repairing the traveled path.

TOWN IS LIABLE FOR DAMAGES arising from its having allowed the sides of the traveled path of a public highway to be incumbered with logs or other things unnecessarily placed there.

PLAINTIFF CAN NOT RECOVER FOR INJURIES SUSTAINED by reason of his own fault or neglect.

CASE for injury sustained by the plaintiff by reason of a defect in the public highway in the town of Whitefield. On the trial, it appeared that the plaintiff was driving a horse in a chaise along the traveled part of the road, when the horse kicked one

of his hind legs over the shaft of the chaise. Plaintiff turned him out of the path, in order to relieve him from the situation he had thrown himself into, when the horse, becoming unmanageable, ran the chaise against a cedar log lying near the traveled part of the highway, which was the immediate cause of the injury. There was a verdict for the plaintiff, subject to be set aside.

Wells and Child, for the defendants

No appearance for the plaintiff.

By Court, SHEPLEY, J. It is contended, that the owner of land adjoining a public highway may lawfully use that part of it, which is not prepared for the public travel. His ownership and right of use so far as may be consistent with the rights of the public need not be questioned. But it is a mistake to suppose the public rights of travel are restricted to the prepared and usually traveled path. While the town has done its duty, when it has prepared a pathway of suitable width in such a manner, that it can be conveniently and safely traveled with teams and carriages as required by the statute; the citizens are not thereby deprived of the right to travel over the whole width of the way as laid out. And they have the right to do so without being subjected to other or greater dangers, than may be presented by natural obstacles, or those occasioned by making and repairing the traveled path. In many parts of the highways these obstacles are small, and in others very great. To allow the sides of the prepared path to be incumbered by logs or other things unnecessarily placed there, would deprive the citizens of the use of the whole width of the way or subject them to unnecessary dangers not contemplated by the laws. It may become necessary to place obstructions upon the sides of it for the purpose of preparing or improving the traveled path by the removal of trees or stones and the like. Beyond this all such obstructions are nuisances, and as unlawfully there, as they would be in the traveled path. If the accident had happened through the neglect or fault of the plaintiff, or by reason of any obstacle naturally existing or necessarily placed in the highway out of the traveled path, he could not have recovered; but this is negatived by the finding of the jury. The driver may be subjected to injury with the most prudent management by a vicious or irritated horse, without any just ground for complaint against the town; but in such cases he can not justly be sub-

jected to the increased danger occasioned by obstacles, which exist only through the illegal act of another person.

Judgment on the verdict.

Cited in *Browning v. Springfield*, 17 Ill. 146, as to when civil damages may be recovered against a municipal corporation.

JONES v. JONES.

[18 MAINE, 308.]

MARRIAGE SOLEMNIZED BY PERSON HOLDING OFFICES OF JUSTICE of the peace and judge of a municipal court is legal, and where the certificate is silent as to the capacity in which he acted in performing the ceremony, the law will assume that he acted in the capacity in which he might lawfully perform it.

STATUTE OF THIS STATE GIVING TO ONE JUDGE JURISDICTION in cases of divorce, gives him jurisdiction in questions of alimony.

DECISION OF JUDGE, IN SUCH CASES, ON A QUESTION OF FACT, can not be appealed from, but is as conclusive as the finding of a jury.

INFANT WIFE MAY MAINTAIN SUIT FOR DIVORCE, in her own name, without acting by guardian or next friend.

GENERAL WORDS IN STATUTE MUST RECEIVE GENERAL CONSTRUCTION, unless there be something in it to restrain them.

LIBEL for a divorce from bed and board for the alleged cruelty of the husband. A divorce was decreed. The other facts sufficiently appear from the opinion.

Clark, for the respondent.

Whittemore, for the libelant.

By Court, **SHEPLEY, J.** Several objections were taken to the proceedings in this case. The first is, that the parties were not legally married. The act establishing a municipal court in the town of Hallowell, stat. 1835, c. 146, provides, that the judge shall have exclusive and original jurisdiction within that town, over all such matters and things as justices of the peace for that county may by law take cognizance of and exercise jurisdiction over. Mr. Gilman, who married these parties, held that office, and also that of justice of the peace for the county, and was duly qualified. He might lawfully marry them as a justice of the peace, unless he was deprived of that power in consequence of his exclusive jurisdiction as a judge. He does not state in what capacity he acted in performing the service, but the law will regard him as acting in the capacity in which he lawfully might perform the duty. It may well be doubted, whether the

terms cognizance and jurisdiction do not refer to such matters only as are of a judicial character, leaving other duties to be performed by justices of the peace. But whatever construction the act may receive, the marriage will be legal.

Another objection is, that one judge has not jurisdiction to decide upon a question of alimony. The act regulating divorces, stat. 1821, c. 71, speaks of questions of divorce and alimony, while that giving the jurisdiction to one judge, stat. 1838, c. 310, speaks only of questions of divorce. That alimony in our law is regarded as an incident to divorce, is apparent from the provision of the statute, c. 71, sec. 5, which creates a lien on the estate of the husband for the performance of any order which the court may make in a suit for divorce. A division of the jurisdiction would be a virtual repeal of that provision. The legislature could not have intended to give jurisdiction over the principal question to one judge, and require the co-operation of a majority in the minor one of alimony, at the same time depriving the party of the intended security to enforce a decree in his favor. The act giving this jurisdiction provides, that any person aggrieved at the opinion of said justice, upon a question of law, may file his exceptions to the same. The language of the act, and the design of the legislature in passing it, clearly indicate the intention that there should be no appeal from a decision of the judge upon a question of fact. His decision is as conclusive as the finding of a jury, and is no more open for revision by the court of law.

Another objection has reference to the capacity of the infant wife to maintain this process. Before the stat. 21 Jac. I., c. 13, if an infant plaintiff or defendant appeared by attorney and not by guardian or next friend, it was error. That statute cured the defect on the part of the plaintiff after verdict; and it became necessary to plead infancy in abatement: 2 Saund. 212, and notes; *Schemerhorn v. Jenkins*, 7 Johns. 373; *Dewey v. Pet*, 11 Pick. 268. In this case the counsel for the libelee submitted a written motion that the libel should be quashed or dismissed because it was not prosecuted by guardian or next friend. Considering the nature of the process this may be regarded as equivalent to a plea in abatement. And in the case of *Wood v. Wood*, 2 Paige, 108, it was decided, that an infant should so prosecute or defend in a suit for divorce. That decision, however, appears to have been founded upon the provisions of the statute and upon the rules of practice established there: *Wood v. Wood*, Id. 454. An infant may at common law bind

himself and others in many cases. He has ability and may lawfully bind himself by an act for his own benefit: *Gouch v. Parsons*,¹ 3 Burr. 1801, and of this description the law regards the marriage contract. Before the statute of 38 Geo. III., c. 87, an infant at the age of seventeen might be an executor and receive moneys and give acquittances. A female infant can lawfully contract marriage, and in doing it can bar herself of dower, and dispose of her personal estate: *Earl of Buckinghamshire v. Drury*, 3 Bro. P. C. 570;² *Harvey v. Ashley*, 3 Atk. 613. So she may maintain a suit on a promise of marriage: *Holt v. Ward*, Fitzgibbon, 175; Id. 275: *Holt v. Ward*, Stra. 937. Whether an infant executor could sue without a guardian or next friend occasioned a difference of opinion. The right to do so was admitted in *Rutland v. Rutland*, Cro. Eliz. 378; *Bade v. Starkey*, Id. 541; *Coan v. Bowles*, 1 Show. 165; *Foxwist v. Tremaine*, 2 Saund. 212. And denied in *Cotton v. Wescot*, Cro. Jac. 441; *Keniston v. Friskobaldi*, Fitzgibbon, 1.

There would seem to be an inconsistency in allowing the acts of an infant executor to be legal, and at the same time subjecting him to the control of a guardian or next friend, while in the act of performance. If the law permits a female infant to enter into the marriage contract, does not the larger include the less power, and enable her to do any act which may be necessary to its perfection, or may arise incidentally out of it? And is it not upon this principle that she is allowed to bar herself of dower and dispose of her property by such a contract? Will the law enable her to assume the duties and acquire the rights of support and protection which that contract gives, and refuse to her the power of enforcing those rights? Is the right to shield herself from the oppressive and cruel acts of the husband less incident to, or connected with the contract, than dower or the disposal of personal effects? But whatever may be the conclusion at common law, the language of the statute, c. 71, sec. 5, regulating divorces of this description, is general, enabling any wife, without exception as to age, to file her libel and obtain relief. And general words in a statute are to receive a general construction, unless there be something in it to restrain them. So inflexible was this rule considered, that the statute of wills, 32 Hen. VIII., having authorized all and every person or persons to devise their lands, it was feared that it might enable infants and insane persons to do it; and the statute 34 Hen. VIII. was passed to introduce these exceptions: *Beckford v.*

1. *Zouch v. Parsons*.2. *Earl of Buckingham v. Drury*, 3 Bro. P. C. 492.

Wade, 17 Ves. 88. The same principle was recognized in the decision, that the statute of fines, 4 Hen. VII., c. 24, bound infants: *Stowell v. Lord Zouch*, 1 Plowd. 369. It is admitted to apply to statutes of limitation: *Demarest v. Wynkoop*, 3 Johns. Ch. 129 [8 Am. Dec. 467]. The statute regulating divorces should accordingly receive such construction as would enable any wife, without regard to age, to institute such a process. And the reasons which would lead the mind to clothe her with that power by the common law, may justly be brought in aid of such a construction.

Decree confirmed as to divorce, and as to alimony it is reserved for further bearing.

ELLIS v. BEALE.

[18 MAINE, 397.]

HORSE-RACING OR HORSE-TROTTING IS A GAME within the statute "to prevent gaming for money or other property." And money lost by betting on a trotting match may be recovered back by the loser. The statute, with respect to the party losing, is remedial, not penal.

EXCEPTIONS from the Middle district court. The action was brought to recover back money lost by the plaintiff in betting on the speed of a horse. The plaintiff offered to prove that he had bet with the defendant; that the money had been deposited with a stakeholder, and that he had paid it to the defendant as the winner. The judge excluded the evidence, on the ground that the facts stated, if proved, would not support the action. The plaintiff filed exceptions.

Wells and Morrill, for the plaintiff.

May, for the defendant.

By Court, WESTON, C. J. The question, upon which this cause must necessarily turn is, whether horse-racing is a game, within the stat. of 1821, c. 18. If it is, there can be no just distinction taken, between the trotting and racing of horses. And we are of opinion, that horse-racing is a game; and so within the statute. Cards and dice are expressly named. "Any other game," embraces a great variety of other devices of chance or skill, by which money may be lost or won. Cock-fighting, horse-racing, and foot-racing are called games, by the statute 16 Charles II., c. 7. Under the statute of 9 Anne, c. 14, although horse-racing is not mentioned, it has been held to be

embraced in the act, under the general words, other game or games: *Blaxton v. Pye*, 2 Wils. 309. So a foot-race has been adjudged to be a game within the same statute: *Brown v. Berkeley*, Cow. 281. In *Sigel v. Jebb*, 3 Stark. 1, Abbott, C. J., was of opinion, that the statute applied to all games, whether of skill or chance, and that it was the playing for money, which made them unlawful. The statute with respect to the party losing, is remedial, not penal: *Bones v. Booth*, 2 W. Bl. 1226. Horse-racing is within all the mischiefs, which render gaming unlawful.

Exceptions sustained.

HORSE-RACING IS A GAME: See *Shropshire v. Glascock*, 31 Am. Dec. 189.

PITTS v. MOWER.

[18 MAINE, 361.]

DISCLOSURE OF TRUSTEE AND JUDGMENT UPON IT ARE ADMISSIBLE in evidence, only between those who are parties to the suit.

WHERE AGENT SELLS HIS PRINCIPAL'S GOODS AND TAKES PROMISSORY NOTE therefor, payable to himself, the principal may, before payment, forbid it to be made to the agent, and a payment to him after this will not be good.

PRINCIPAL MAY SUE IN HIS OWN NAME on a contract of sale made by his agent, unless such contract has been extinguished, as it may be with us, by taking a negotiable promise.

EXCEPTIONS from the Middle district court. Assumpsit on an account annexed, charging a "horse power." The evidence showed that Hiram A. Pitts was the plaintiff's agent in selling articles called horse powers, and sold one to the defendants, taking therefor their note running to himself, and payable in specific articles. A copy of the judgment and disclosures of the defendants as trustees of Hiram A. Pitts were read in evidence by the defendants, against the plaintiff's objection. The judge charged the jury, that if they found that Hiram A. Pitts was the plaintiff's agent, and had authority to take a note running to himself, the plaintiff could not recover. Plaintiff excepted. The other facts appear from the opinion.

Wells and May, for the plaintiff.

H. A. Smith, for the defendants.

By Court, SHEPLEY, J. It has been decided that the disclosure of a trustee and the judgment upon it are to be received in

evidence only between those who are parties to the suit: *Wise v. Hilton*, 4 Greenl. 435. In this case the plaintiff was not a party to the suit in which the disclosure was made, and he is not bound by that judgment. When an agent sells the goods of his principal and takes a promissory note payable to himself, the principal may interpose before payment, and forbid it to be made to his agent; and a payment to the agent after this will not be good. And the principal may sue in his own name on the contract of sale, except when, as with us, it is extinguished by taking a negotiable promise. It is said in argument for the defendants, that the law will not imply a promise where there is an express one; and that there being an express one in the note to Hiram A. Pitts, one can not be implied to the plaintiff. The law regards the express contract made with the agent in the purchase as made with the principal, and as remaining unextinguished by the note not negotiable. These rights of the principal are well established, and were recognized in the cases of *Tilcomb v. Seaver*, 4 Greenl. 542, and *Edmond v. Caldwell*, 15 Me. 340. In this case the defendants were notified before payment, or judgment against them as trustees, that the plaintiff was the owner of the property sold, and that he claimed to have the payment made to himself. If they thought proper to disregard that notice, the rights of the plaintiff can not thereby be impaired.

Exceptions sustained and new trial granted.

WHEN PRINCIPAL MAY SUE ON CONTRACT MADE BY HIS AGENT: See *Beebes v. Robert*, 27 Am. Dec. 132, note 137; *Tutt v. Brown*, 15 Id. 33; *Arlington v. Hinds*, 12 Id. 704, note 709; *Girard v. Taggart*, 9 Id. 327, note 335.

FRENCH v. CAMP.

[18 MAINE, 433.]

ALL PERSONS HAVE RIGHT TO TRAVEL ON ICE OVER PUBLIC RIVER, and any one who cuts a hole in the ice, in or near the traveled way on such ice, is liable for injuries sustained by those passing over said way, without fault or negligence on their part.

ACTION on the case. The declaration alleged that, owing to a hole cut in the ice on the Penobscot river by the defendants, the plaintiff lost his horse by drowning, he having fallen into the river through said hole. The jury found for the plaintiff, and the defendants filed exceptions. The other facts appear from the opinion.

J. Appleton, for the defendants.

McCrillis, for the plaintiff.

By Court, WESTON, C. J. The waters of the Penobscot are, of common right, a public highway, for the use of all the citizens. This right is generally exercised when they are in a fluid state; but when congealed, the citizens have still a right to traverse their surface at pleasure. Travelers have occasion to cross that, and other public rivers or streams, upon the ice, at points where public ferries have been established. And certain duties are by law imposed upon ferrymen, to aid the public in the enjoyment of this right: Stat. 1825, c. 292. And it is matter of general notoriety, that in all the settled parts of the state, public rivers and streams, not broken by falls or rapids, are traversed up and down upon the ice, in such well-marked and beaten ways, as are most convenient for the public. They are not proper subjects for the application of the statute laws, provided for the location of public roads or highways; nor are they susceptible of being governed by the rules and principles by which easements of this kind may be otherwise acquired on land. Yet we do not hesitate to regard them as public rights, so far under legal protection, as to entitle a party to a civil remedy, who is wantonly and unnecessarily disturbed by others, while attempting to participate in their enjoyment.

It is contended, that the defendants had an equal right to cut a hole in the ice, to water their horses or other cattle, or for other purposes. Assuming that the defendants have as good a right to the use of the water, as the plaintiff or the public generally had to the right of passage, the use of a common privilege should be such as may be most beneficial and least injurious to all who have occasion to avail themselves of it. To cut a hole in the center of a road upon the ice, or so near it, as to entrap a traveler, is a wanton and unnecessary disturbance of the right of passage. It is making an improper use of a part of the river, lawfully appropriated, for the time being, to a different purpose. It is a direct violation of that great principle of social duty, by which each one is required so to use his own rights, as not to injure the rights of others. With the common bounty of Providence, accessible to them at all points below the surface of the ice, the act of the defendants, in subjecting the plaintiff to loss, to whom no fault can be imputed, and who was in the lawful exercise of his rights, can not be justified; and in our opinion, they must be held answerable for the damage they have occasioned.

Judgment on the verdict

GREELEY v. WATERHOUSE.

[19 MAINE, 9.]

VALID BOTTOMRY BONDS MAY BE EXECUTED BY THE OWNER of a vessel at the home port, if the money obtained thereon is given on maritime risks, and at the hazard of the lender, although not applied to the purposes of the ship or of the voyage.

REQUITED CONSIDERATION OF A BOTTOMRY BOND may be inquired into, and contradicted by the creditors of the owner of the vessel.

UNRECORDED MORTGAGE OF A VESSEL IS INVALID, according to the statute of 1839, c. 390, unless delivery and possession accompany the mortgage.

REPLEVIN for the brig Albert and two thirds of the brig Watson. The evidence disclosed the facts that prior to October 26, 1839, Luther Jewett was indebted to plaintiffs in an amount exceeding seven thousand dollars, for money advanced; that on that date he executed bottomry bonds on the above vessels to plaintiffs, to secure such indebtedness. The bonds recited that the sum of thirty-six hundred dollars had been advanced on the brig Albert, and two thousand dollars on the brig Watson, but in fact no new consideration was paid. The defendant justified as sheriff under a writ in favor of the Exchange bank against Jewett. Defendant's counsel objected to the plaintiffs' testimony, but consented to a default, if, in the opinion of the court, the plaintiffs were entitled to recover. If so, judgment was to be for them; if not, the default was to be taken off, and plaintiffs were to be nonsuited.

Rand, for the defendant.

Fessenden and Deblois, for the plaintiffs.

By Court, WESTON, C. J. The plaintiffs, as acceptors, having paid the bills indorsed by George Jewett, he had no remaining interest or liability in relation to them, and was clearly a competent witness. And the interest of Luther Jewett is balanced in the case, it being a contest between *bona fide* creditors of his for security. The objection made at the trial to the testimony can not prevail, and is not pressed by the counsel for the defendant. The doctrine in relation to bottomry and *respondentia* bonds is very elaborately considered and exhausted by Mr. Justice Story, in *Conard v. The Atlantic Ins. Company*, 1 Pet. 386, and in the *Case of the Brig Draco*, 2 Sumn. 157. He investigates, with his accustomed ability, their origin and history, illustrated by adverting to the authorities, English and American, bearing upon the question, as well as to the works of distinguished jurists on the continent of Europe. It is very satisfactorily made out that

they may be executed by the owner of a ship at a home port, and that their validity does not depend upon the application of the money, when obtained by the owner to the purposes of the ship, or of the voyage. But it is of the very essence of a bottomry bond, that it is for money taken up on maritime risks, at the hazard of the lender: *Case of the Draco, supra*; *Simonds et al. v. Hodgson*, 3 Barn. & Adol. 50.

The instruments upon which the plaintiffs rely, copies of which make part of the case, are based upon loans apparently of this character. Nothing is there disclosed which shows that the loans were not made upon the risk, essential to this species of contract. But when the rights and interests of third persons are to be affected, the true nature of the transaction is open to investigation. Property is not to be put out of the reach of vigilant creditors, and the truth shut out by the mere form of instruments: *Clapp v. Tirrell*, 20 Pick. 247.

Looking at the facts proved, it appears that the money, intended to be secured by the bonds, was not originally advanced upon the credit or hypothecation of the vessels named in the conditions, but as security for debts, due from Luther Jewett to the plaintiffs, which had accrued some months before, principally for advances on bills drawn on them by Jewett. If the account of the plaintiffs had been thereupon discharged, as far as the same had been secured by the bonds, it might have been regarded virtually as a new loan on bottomry. In *Conard v. The Atlantic Ins. Company*, 1 Pet. 435, one of the loans obtained was applied in part to the payment of a prior loan. But in this case the bonds were manifestly proffered and received as collateral security. It does not appear that Jewett was discharged from his indebtedness on account, or as drawer of the bills, or that he had credit in account for the sums stated to have been advanced by the plaintiffs in the condition of the bonds. From the correspondence it appears that they were looking to the sales of goods belonging to Jewett under their control, which after the receipt of these bonds, they insist must be made available for their benefit, although the market was unfavorable. In Jewett's letter to the plaintiffs, inclosing the bonds, he advises that he sends them as a guaranty, and as such they must be presumed to have been accepted. The movement appears to have been altogether voluntary on his part. If the security was collateral, which is plainly deducible from the facts, the debt was not at risk, although the collateral security was to be available only upon a contingency. It results, that these instruments can

not have effect as bottomry bonds, as the obligation of the debtor to refund the consideration upon which they were based, did not depend upon a maritime risk, but remained in force at all events.

It is insisted, however, for the plaintiffs, that if their title can not be sustained as lenders upon bottomry security, they have a right to hold the vessels in question as mortgagees. It is an objection fatal to their claim upon this ground, that their mortgage was not recorded, as required by the statute of 1839, c. 390. This is dispensed with only where delivery and possession accompany the mortgage. No delivery was made by Jewett, nor did the plaintiffs attempt to take possession until some time after the bonds were executed. According to the agreement of the parties, the default must be taken off and the plaintiffs become nonsuit.

For decisions involving the subject of bottomry, although not passing upon the question here raised: See *Robertson v. United Ins. Co.*, 1 Am. Dec. 166; *Kenny v. Clarkson*, 3 Id. 336; *Jennings v. Pa. Ins. Co.*, 5 Id. 404

WHITNEY v. MUNROE.

[19 MAINE, 42.]

TO DETERMINE WHETHER ONE IS A TRUSTEE or not under the law of foreign attachment, a usual but not necessarily decisive test is, whether the principal has or has not a right of action against the supposed trustee.

INTEREST OF A JOINT CONTRACTOR, IN THE HANDS OF A TRUSTEE, may be reached by foreign attachment, although the effect will be to sever the liability.

PRIORITY BETWEEN THE RIGHTS OF JOINT AND INDIVIDUAL CREDITORS will not be inquired into, in a suit by the latter against the debtor's trustee.

FOREIGN attachment. On October 24, 1839, J. S. Munroe and J. Goodwin contracted with Ira Crocker, as agent for the Bank of Cumberland, to cut and haul lumber for the bank at a specified rate, to be paid for upon the completion of the work. They performed the contract, and at the time of the institution of this action, there was due them the sum of seven hundred and sixty dollars and seventy-eight cents.

Haines, for the trustees.

Fessenden and Deblois, for the plaintiffs.

By Court, WESTON, C. J. The policy of the law of foreign attachment is, to render the effects and credits of the principal debtor, in the hands of the trustee, available for the benefit of the creditor. The law should receive a liberal construction, in

furtherance of this object. With respect to credits, one of the usual tests, to determine the question, whether trustee or not, is, whether the principal has, or has not, a right of action against the supposed trustee. But this test is not in all cases necessarily decisive, as there are exceptions to its application, of which the counsel for the plaintiff have put some examples. The alleged trustees in this case are the holders of funds, of which the principal debtor is entitled to a moiety. He has it not in his power, without joining the party entitled with him, by any coercive process, to compel payment. The principal reason for the necessity of this joinder usually given is, that otherwise the party indebted might be liable to the cost and inconvenience of two suits upon one contract. Hence if he himself sever the cause of action, by paying one of his joint creditors his proportion, he is liable to the several creditor. So the law, in carrying out its remedial provisions, may sever a contract, so as to subject the debtor to the liability of two suits upon one contract. The death of one of two jointly contracting parties, renders the survivor and the administrator of the deceased party each liable to a several suit. So if the trustee be indebted to the principal in an entire sum, beyond the amount wanted to satisfy the judgment recovered by the attaching creditor, he will remain liable to the action of his principal for the residue. The trustee is but a stakeholder; and the law indemnifies him for the expense of the suit, by allowing him to deduct it, as a charge upon the fund in his hands. Notwithstanding, therefore, if the trustees are charged in this case, an entire liability will thereby be divided into two parts, in the judgment of the court, this objection can not prevail.

The counsel for the trustees further insist, that they ought to be discharged because the fund may be wanted for the joint creditors of Munroe and Goodwin, who it is said in the business, from which it accrued, are to be regarded as partners. It is not necessary to decide, whether they stood in this relation or not, as it does not appear that they had any joint creditors, or if they had, that they have any occasion to interfere with this attachment. If they would claim and assert any such superior right, it was easy for them to have done so, by suits against both, summoning the same trustees. The court would then have been called upon to determine who had the better title to the fund. But no such question arises in the case, as now presented. The attaching creditor is entitled, if wanted to satisfy his judgment, to one half the debt disclosed.

Trustees charged.

HOOPER v. DAY.

[19 MAINE, 56.]

FOREIGN ATTACHMENT.—GOODS CONTAINED IN BOXES SECURELY FASTENED, so that their character is entirely concealed, when deposited with a third person are not liable to attachment by ordinary process, but may be reached by process against the depository as trustee.

FOREIGN attachment. One Mrs. Day, previous to the service of the plaintiff's writ, left with the defendant Hood certain household goods, contained in trunks and boxes securely fastened, so that their character was unknown. The day after the service of plaintiff's writ they were attached on another writ, in the action of *Aitcheson v. Day*. On the trial the defendant Hood was charged as trustee, from which ruling this bill of exceptions was taken.

Codman and Fox, for the defendants.

Rand, for the plaintiffs.

By Court, SHEPLEY, J. It is contended, that the goods were so intrusted or deposited, that they could be attached by the ordinary process of law; that the attachment made on the following day by such process should be regarded as the only legal one; and that the trustee should be discharged. And reliance is placed on the cases of *Allen v. Meguire*, 15 Mass. 490, and *Swell v. Brown*, 5 Pick. 178, to sustain these positions. In the former case it is said, that the trustee process "will lie only where the goods can not be come at to be attached by the ordinary process of law." This is only a statement of the statute provision, and it does not assist one to determine when they are so deposited. There is a more important intimation in the case, that a person summoned as trustee, "and not disclosing anything by which it might be inferred, that he exposed them to attachment," may be considered as the trustee and charged accordingly. The latter case decides, that a person having possession of the goods of the debtor without his consent or contract, may be liable to this process, when they can not be attached by the ordinary process. In the case of *Burlingame v. Bell*, 16 Mass. 318, it was decided, that a construction so close as to be confined to the literal effect of the words of the statute, was inadmissible; and it is said that goods may be so placed in the hands of another "as to be physically within the reach of an officer to attach; and yet there may be difficulties in the way of attaching them which a creditor may fairly wish to avoid." In this

case the trustee does not state, that he exposed the goods so that they could be attached by the ordinary process. They were in trunks locked and boxes nailed, which were placed in one of the chambers of the dwelling-house of the trustee. It does not appear that the officer did or could know the contents of them, or in what part of the house they were to be found, or that he would be permitted to search for them. He as well as the creditor might well desire to avoid the risk of attaching articles not exposed to sight, and which might not be liable to attachment. They were not so situated as to enable the officer acting with prudence to make an attachment without the danger of subjecting himself to an action of trespass for taking goods not liable to attachment. Goods so situated can not be regarded as liable to attachment by the ordinary process in the sense contemplated by the statute.

Exceptions overruled.

CARTER v. BRADLEY.

[19 MAINE, 62.]

HOLDER OF A NOTE IS BOUND TO NOTIFY ALL PRIOR PARTIES to whom he intends to resort, of demand and non-payment.

FAILURE TO NOTIFY A PRIOR, WILL NOT RELEASE A SUBSEQUENT INDORSE properly notified.

SUBSEQUENT INDORSE IN ORDER TO CHARGE PRIOR PARTIES has generally a day after his own liability has become fixed to notify those who stand before him.

MISNOMER OF AN INDORSE IN A NOTICE intended to charge him, will not vitiate the same if he knew that the notice was intended for him and that the note described was the one in suit.

ASSUMPSIT on a promissory note, dated November 5, 1838, made by Osgood Bradbury, payable in sixty days to William Bradbury or order, at either of the Portland banks, and indorsed by him and the defendant. On January 7, 1839, the Manufacturers and Traders' bank of Portland caused the following notice to be left at the defendant's residence, and the same came to his possession the same day:

"**SAMUEL A. BRADBURY:** A note signed by Osgood Bradbury and indorsed by you for two hundred dollars — cents became due this day, which is the last day of grace, and is unpaid. You are therefore requested to pay the same. **E. GOULD, Cashier.**"

The further facts appear in the opinion. Plaintiff had verdict.

J. D. Hopkins and S. Fessenden, for the defendant.

F. O. J. Smith, for the plaintiff.

By Court, WESTON, C. J. The instructions first given by the judge are fully sustained by the case of *Page v. Webster*, 15 Me. 249 [33 Am. Dec. 608], to which we refer. The holder of a bill or note is bound to notify all the prior parties, to whom he intends to resort: Chitty on Bills, 295. If he notifies his immediate indorser only, he waives his remedy against a prior indorser; but in running back to the series of liabilities, each party receiving seasonable notice, has generally a day to give notice to such as stand before him, by which their liability becomes fixed, whether notified by the holder or not: Bayley on Bills, 263, and the cases there cited. If the plaintiff failed to give seasonable notice to the first indorser, he may have lost his remedy against him, but may charge the defendant, the second indorser, if he has caused him to be legally notified. If the defendant would charge the first indorser, it became his duty to take care, that due notice was forwarded to him. It appears, that the defendant had indorsed such a note as is described in the notice, which he is proved to have received. The question is, whether the misnomer in the latter part of the surname did so vitiate the notice, as to render it legally ineffectual. The jury have found that the defendant knew that the notice was intended for him, and that the note designed to be described therein was the one now in suit. If this was a point to be determined upon inspection of the paper alone, it was more proper that it should have been settled by the presiding judge. But there were other facts to be considered. The messenger, Hsley, understood the notice to have been made out for the defendant, and accordingly left it for him with the keeper of the public house, where he boarded. Mr. Moorhead, with whom it was left, must have so understood it, for it appears that he did, on the same day, hand the notice to the defendant. Taking these facts in connection with the description of the instrument declared on in the notice, we are of opinion that they sustain the verdict found by the jury, and that it was a matter properly submitted to their consideration. But if it had rather belonged to the court to decide this point, as it has been correctly decided, it furnishes no sufficient ground of exception.

Judgment on the verdict.

As to notice to indorser, see *Fish v. Jackman*, post, 769, and note.

GOWER v. STEVENS.

[19 MAINE, 92.]

RETENTION OF THE POSSESSION OF PERSONAL PROPERTY SEIZED by a sheriff or his deputy is necessary to preserve the lien of the attachment.

SHERIFF CAN NOT CONSTITUTE THE DEBTOR HIS AGENT to keep the property attached.

ATTACHMENT DISSOLVED BY REASON OF THE POSSESSION of the property seized remaining with the debtor can not be revived by notice.

REFLEVIN for a yoke of oxen, one horse and wagon, and a buffalo skin. Plaintiff, as deputy sheriff, had attached said articles by authority of two writs issued in two actions against one J. H. Lambert, but by an agreement between them had allowed Lambert to retain possession. Defendant, as deputy sheriff, had subsequently attached the oxen in the possession of Lambert, and the horse, wagon, and robe, in the possession of plaintiff, to whom Lambert had delivered them upon being informed that defendant had a writ against him. Plaintiff offered to prove that the property attached by him was left in the possession of Lambert by the authority of the attaching creditor, but the testimony was excluded. Upon the trial plaintiff was nonsuited.

Codman and Fox, for the plaintiff.

F. O. J. Smith, for the defendant.

By Court, WESTON, C. J. To constitute and preserve an attachment of personal property, by process of law, the officer serving such process must take the property and continue in possession of it either by himself, or by a keeper by him appointed for this purpose. It has never been understood that he could, consistently with the preservation of the lien, constitute the debtor his agent to keep the chattels attached. Except so far as authorized by special statute provision, he can not leave such property with the debtor, without dissolving the attachment: *Woodman v. Trafton et al.*, 7 Greenl. 178. Nor are we aware, that it can be preserved against persons having notice of the facts, although an implication to this effect may be found in the case cited and in *Bruce v. Holden*, 21 Pick. 187. Both those cases are strong authorities to show, that an attachment is dissolved, by leaving the property in the hands of the debtor; and if once dissolved, we are not satisfied that it can be revived by notice. If an officer attaches goods in a store or warehouse, and leaves them in the possession and under the control of the debtor, it does not appear to us that a second attaching creditor

and his officer can be repelled, by mere notice from the debtor, or from any other person who may happen to have had knowledge of the first attachment. Both might well reply, that such attachment had been relinquished or had been lost by a want of care and vigilance on the part of the first officer. The statute of 1821, c. 60, sec. 34, cited for the plaintiff, is based upon the assumption, that but for the provision there made, the first attachment would be dissolved by suffering the property to remain in the possession of the debtor.

The counsel for the plaintiff has attempted to bring the attachment of the oxen within the statute cited. But it can not be held available for his benefit, unless upon taking security, as is therein provided, which was not done. The law of attachment can not be varied by the consent of the creditor. He can do nothing to impair the rights of third persons. It is insisted, that the plaintiff may hold the horse, wagon, and buffalo robe, as he had once attached them, and being in his possession, when taken by the defendant. It is a sufficient answer to this position, that the attachment made by the plaintiff had been dissolved for nearly three months, and that when he took the property a second time, the return day of the writ from which he derived his authority was passed.

Nonsuit confirmed.

PERSONALTY ATTACHED MUST BE KEPT IN THE POSSESSION OF THE OFFICER: *Shepard v. Butterfield*, 4 Cush. 430, citing the principal case: *Lowry v. Cady*, 24 Am. Dec. 628; *Hollister v. Goodale*, 21 Id. 674, and note; *Hemmenway v. Wheeler*, 25 Id. 411, and note; *Odiorne v. Colley*, 9 Id. 39; *Naylor v. Denie*, 19 Id. 319.

HASCALL v. WHITMORE.

[19 MAINE, 102.]

WANT OF CONSIDERATION FOR A PROMISSORY NOTE is no defense in a suit thereon against a *bona fide* indorsee, without notice and before maturity.

PURCHASER OF A PROMISSORY NOTE BEFORE MATURITY, with notice of the want of consideration, from a *bona fide* indorser without notice, is entitled to all the rights of his vendor.

ASSUMPSIT on a promissory note. The opinion states the facts.

W. P. Fessenden, for the plaintiffs.

Fbx, for the defendant.

By Court, SHEPLEY, J. The plaintiffs are joint owners of a negotiable promissory note purchased before it became payable.

One of them is a holder for value without notice; the other with notice, but deriving his title through others who were *bona fide* holders without notice. As between the original partners the note may be regarded as made without consideration. Andrews, who was the first and an innocent indorsee for value, did not indorse it, when he disposed of it, and he was properly admitted as a witness: *Whitaker v. Brown*, 8 Wend. 490. He could have collected it, for the want of consideration could not be set up against him. A knowledge of the facts acquired afterward would not affect his rights. He had not only a legal right to hold and collect it, but to negotiate it. And the maker could not impair that right by giving notice, that it was made without consideration. Nor would he be injured by a transfer to one having a full knowledge of the facts; for his position would not be more unfavorable than before.

Bayley states, that the want of consideration can not be insisted upon "if the plaintiff, or any intermediate party between him and the defendant, took the bill or note *bona fide* and upon a valuable consideration:" Bayley, 550, ed. by Phillips & Sewall. The case of *Thomas v. Newton*, 2 Car. & P. 606, was assumpsit on a bill drawn by Wilson on the defendant and accepted, and by him indorsed to Dandridge and by him to the plaintiff. The defense was a want of consideration. Lord Tenterden says: "If the defendant shows, that there was originally no consideration for the bill, that throws it on the plaintiff to show that he gave value for it, or that value was given for it by Dandridge; for if either the plaintiff or Dandridge gave value for it, the plaintiff may recover; otherwise the defendant is entitled to recover." In *Solomons v. The Bank of England*, 13 East, 135, note (b), it appeared, that the bank note had been obtained fraudulently from Batson & Co., who informed the bank of it. The plaintiff as holder claimed payment of the bank, and it was refused. He had received the bill of Hendricks & Co.; and it did not appear that he paid value for it before notice. Lord Kenyon says: "Upon this evidence I think Solomons must be considered to be in the same situation as Hendricks & Co." But as it did not appear, that they were holders for value without notice, the plaintiff did not recover. In *Smith v. Hiscock*, 14 Me. 449, where a negotiable promissory note had been indorsed *bona fide* and for value before it was payable, the chief justice says: "The want of consideration is not an available defense against a subsequent holder, to whom it may have been passed after it was due. The promise is good to the first in-

dorsee free from that objection; and the power of transferring it to others with the same immunity is incident to the legal right which he had acquired in the instrument. By the first negotiation the want of consideration between the original parties ceases as a valid ground of defense."

If the relations between the maker and holder only were to be considered, the want of consideration would be a good defense against one, who did not purchase for value, or who did so after it was once due. And yet it has been decided that one so situated may avoid that defense by showing, that it could not have been interposed against a prior holder. The same principle appears to be equally applicable to a holder who has purchased with notice. If the relations between himself and the maker only were to be considered he could not recover. But purchasing of one who had no notice he must be considered to be in the same situation and as entitled to the same protection.

Defendant defaulted and judgment for amount due on the

MAKIN v. INSTITUTION FOR SAVINGS.

[19 MAINE, 128.]

SAVINGS BANK THAT UNDERTAKES TO INVEST ALL MONEYS DEPOSITED with it, and repay them upon demand made in conformity with its by-laws, is liable to an action of *assumpsit* upon failure so to do.

ASSUMPSIT. The plaintiff was a depositor with the defendant, a savings bank. Upon demand made in conformity with its by-laws, the defendant refused to pay over to plaintiff the money he had on deposit. These facts being established on the trial, the court directed a nonsuit, to which exceptions were taken.

Codman and Fox, for the plaintiff.

Longfellow and Davis, for the defendant.

By Court, SHEPLEY, J. This corporation was designed to afford assistance to those willing to preserve and invest small gains until needed, or until their accumulation would authorize a more permanent investment. Its purpose was a charitable one. It did not propose to enrich itself by any favorable result of its operations. In the administration of this charity it undertook to invest the money deposited, in public or private stocks, or to loan it on a pledge of them in preference to other loans. The case finds that it was so invested. It is said, that serious losses have happened by a fall in the price of the stocks purchased, so

that the corporation has become unable to pay the several depositors the money received of them. It is insisted, that the corporation has discharged its duty faithfully; has invested the money in the manner it engaged to do; that a depositor can not therefore maintain an action at law to recover his money; that he must take his share of the stocks, or resort to equity for relief. The institution is regarded in the argument as sustaining the relation of a trustee to the depositor, and it is urged, that it should be dealt with as such. This argument overlooks the consideration, that the corporation not only undertook to receive and to invest the money in stocks, but also to repay it at certain times prescribed by itself. It assumed that it would have the ability to do this; expecting, doubtless, that the losses would be made up from the excess of interest beyond that, which it promised absolutely to pay. In this it may have been disappointed; and may find itself, like individuals, assuming responsibilities from a confidence reposed in the value of stocks or other property, unable to perform what it has promised. Its erroneous judgment of what it would accomplish for the benefit of the depositors, and the unexpected losses suffered, can not in law excuse it from the performance of promises made to them. It assumed other and greater liabilities than those properly appertaining to a trustee. A trustee undertakes to act with faithfulness and prudence in preserving and investing property, and to deliver it over, or the proceeds of it, as required. He does not assume to bear the risk of losses. This corporation did, in effect, assume the risk of loss. For it undertook at all events to pay a stipulated interest, and to repay the principal. It may be very true, that it would be more equitable to apportion the losses among all the depositors, instead of allowing one to obtain his money without loss, and thereby subject another to an additional or a total loss. Whether such a result could or not be avoided by some proceeding on the part of the corporation, is not now presented for consideration.

Our law allows the vigilant creditor to interpose by attachment, and to obtain, if he can, his whole debt; leaving, it may be, those less vigilant or fortunate, to an entire loss. The case as presented does not exhibit any sufficient ground of defense.

Exceptions sustained, and new trial granted.

STATE v. HODGSKINS.

[19 MAINE, 155.]

PROOF OF MARRIAGE IN FACT is in contradistinction to proof inferable from circumstances.

MARRIAGE IN FACT, IN A CRIMINAL PROSECUTION FOR ADULTERY, must be proved by some person present at the ceremony, or by the production of the record, or by the confession of the prisoner.

PERFORMANCE OF THE MARRIAGE CEREMONY, by one duly authorized for that purpose, is necessary to be proved in a criminal prosecution for adultery.

INDICTMENT for adultery. The opinion states the facts.

A. Haines, for the defendant.

D. Goodenow, attorney-general, *contra*.

By COURT, WHITMAN, C. J. The indictment against the prisoner contains a charge of the crime of adultery. Two exceptions are taken to the proof in support of it. The first is, that the evidence of the marriage of Hodgskins was insufficient. A witness testified that she saw the ceremony performed, but can not tell by whom, and gave no description of the person performing it, whereby his official character could be indicated. This evidence was accompanied by proof of cohabitation, between the parties, immediately following the performance of the ceremony, till they had nine children. Was this sufficient to authorize the finding of the fact of marriage? It is indispensable that this fact should be proved; and the proof of it must be such as the law, in the particular case, requires. Different cases, in which the proof of a marriage is made requisite, require different evidence. In settlement cases, and some others, reputation and cohabitation, in some instances, have been deemed sufficient. But in civil actions, for criminal conversation, and an indictment for bigamy, it has been held in England, that a marriage in fact must be proved: 4 Burr. 2059. In that country the common law courts have not cognizance of the crime of adultery. We have from thence therefore no adjudged cases on this point, in reference to that particular crime. But the crime of bigamy is an offense of the same grade; and the rule as to the proof of marriage must be the same in both. The proof of a marriage in fact is in contradistinction to proof inferable from circumstances.

This rule, as to proof of marriage in fact, is considered as having been somewhat modified by the decision in a case cited in 1 East's P. C. 470. That was an indictment for bigamy. In

addition to the proof of reputation and cohabitation, till after the birth of a number of children, it was proved, that, in a judicial proceeding in Scotland, the prisoner had signed a paper, containing a full acknowledgment of his marriage, a copy of which was produced. Upon this evidence the court are stated to have adjudged the proof sufficient; and some of the judges were of opinion, that the confession so made would have been alone sufficient. It is a well-settled principle of law that confessions, if made deliberately and understandingly, and against the interest of the party making them, are the best evidence that can be expected. But there are numerous exceptions to this rule, arising from policy or other considerations. If there be a subscribing witness to a simple note of hand, the confession of the maker, that he signed it, can not be proved till it shall be made apparent that the subscribing witness can not be produced; and this rule is still more pertinaciously adhered to in reference to instruments of a higher nature. But the supreme court in this state has so far yielded to the modification of the ancient rule, in conformity to the opinion of some of the judges in the case last cited, as to determine, in cases of adultery, that the confession of the adulterer, deliberately and understandingly made, of his marriage, shall be admissible, and be considered *prima facie* evidence of the fact: *Cayford's case*, 7 Greenl. 57, and *Harris' case*,¹ 2 Fairf. 391. Before arriving at this result, Chief Justice Mellen went into an elaborate course of reasoning to establish the reasonableness of it. Thus far and no further have the courts gone in dispensing with direct proof of the fact of marriage in such cases.

The question now is, can we consider the proof of the marriage, in the case at bar, as proof of a marriage in fact; for the case does not contain any evidence of a confession of it. It should be with great caution that innovation should be resorted to in reference to the rules of evidence, as well as in relation to all other rules of law. It is not unfrequently the case, that it would be better to leave, undisturbed, a rule, which has been long in use, so as to become familiarly known, and to which our habits have become adapted, and in some measure fixed, even if, abstractly considered, it should be demonstrable, that in lieu of it, some other rule would have been preferable. If, in cases like the present, the rule formerly was, that a marriage in fact should be proved, by which, it is to be understood, that it should be by some person present at the performance of the ceremony,

1. *Ham's case*.

or by the production of the record of the marriage, and the only modification of that rule, as yet recognized, is the admission of proof of the confession of the fact by the prisoner, deliberately and understandingly made, we must look to the evidence, and see whether it comes fairly within either of those rules.

The proof here is by a person who was present at the performance of a marriage ceremony, between the prisoner and his supposed wife, at her father's house. But the witness can not tell who performed that ceremony; nor whether it was by a clergyman or magistrate, or any other person. The object of requiring the testimony of a person present at the marriage is not merely to prove the performance of the ceremony by some one; but to prove that all the circumstances attending it were such as to constitute it a legal marriage. There should be something disclosed by which it may satisfactorily appear that the person performing the ceremony was legally clothed with authority for the purpose. In the *Case of the Indictment against Norcross*, 9 Mass. 492, it was proved that the ceremony was performed by Doctor Morse, of Charlestown, a person well known as being an ordained clergyman in that town, and as such having authority to solemnize marriages. No question was made but that he was so authorized. No objection, therefore, was made to the proof in this particular; but it was insisted that it should have been by the record of the marriage, but this the court overruled. In a settlement case in England, *Rex v. The Inhabitants of Frampton*,¹ 10 East, 282, the proof of the marriage of the pauper was strenuously contested upon the ground that it did not appear to have been solemnized by a person having authority for the purpose. There was evidence of his cohabitation with his supposed wife for eleven years, and of the birth of children during that time. This alone seems not to have been regarded, in that case, as sufficient; possibly because there was the want of evidence of reputation in regard to it. However this may be, it seems to have been deemed necessary to produce further evidence of the fact of a marriage. Accordingly a witness was produced, who testified that the husband of the pauper was a soldier in the British army, at St. Domingo, and that while so there, he saw him married in a chapel there, by a person there officiating as a priest, and in the habiliments of one; that the ceremony was in French, but was interpreted to the parties in English; and appeared to be in conformity to the marriage service in England. Lord Ellenborough, and the other judges

1. *Rex v. Frampton*.

of the king's bench, in that case, considered that there was evidence of a marriage by a person so described, that it was reasonable to believe that he had authority for the purpose, and that the marriage was valid; it having been followed by cohabitation and the birth of children between the parties.

If such proof could be deemed essential in a settlement case, *a fortiori*, something, at least equivalent, would seem to be requisite in a criminal prosecution for a heinous offense. In the case at bar, the proof is much short of what seems to have been supposed to be necessary in that case. There then is not the slightest indication in the testimony of any authority for the purpose, on the part of the person who performs the ceremony: 5 Wend. 231;¹ *Green et al. v. Gridley*,² 10 Id. 254; Greenl. on Ev., secs. 83, 92; *Damon's case*, 6 Greenl. 148. A marriage in fact, therefore, as contradistinguished from one inferable from circumstances, is not proved. And there being no evidence of a confession of the fact, by the prisoner, we think the exceptions must be sustained, and a new trial granted. It is unnecessary, therefore, to consider the other exceptions taken by the prisoner.

PROOF OF MARRIAGE IN CRIMINAL CASES.—The above decision is illustrative of a long line of cases which carry the presumption of innocence, in criminal prosecution, to an extent, it is believed, likely to result in the escape of criminals rather than in the furtherance of justice. It is now well recognized that the establishment of the marital relation varies in civil and in criminal proceedings. And this is eminently proper—because the general presumption of innocence which would operate to legitimize children and preserve the sanctity of man in his relation with woman in the one case, tends in the other instance to make him guiltless of gross offenses against the marriage contract. The presumption operates upon the same state of facts differently in the two proceedings; and does so operate because it is deemed best for the public good and in keeping with fundamental rules of criminal trials. Some writers have delighted to point out and analyze a so-called conflict of presumptions in discussing this question, and have dwelt at length upon the neutralizing effect of the presumption arising from cohabitation and reputation when brought in contact with the presumption of innocence in penal causes. But we conceive it to be a general presumption of innocence, as above stated, which is applied to the civil as well as to the criminal action. The wisdom of considering circumstantial evidence of marriage sufficient in civil proceedings and of requiring proof of an actual marriage in trial of indictments for violating the marital contract we do not question—it is the amount and character of the evidence required by many courts to prove the actual marriage that we can not accept.

The following authorities maintain the general proposition that an actual marriage must be proved in criminal cases where the fact of marriage is the gist of the crime: 2 Greenl. on Ev., sec. 461; 1 Whart. on Ev., sec. 85 *et seq.*; Whart. Crim. Ev., sec. 171 *et seq.*; Roscoe's Crim. Ev. sec. 17; Bishop's

1. *Wilcox v. Smith*; 8 C., 21 Am. Dec. 213.

2. *Dean v. Gridley*.

Stat. Crimes, sec. 606 *et seq.*; 1 Bish. Mar. and Div., c. 25. The earliest case of which record has been kept in the English reports involving this topic is that of *Morris v. Miller*, 4 Burr. 2056; S. C., 1 W. Bl. 632, which singularly enough is not a criminal proceeding at all, but an action for criminal conversation. The opinion of the court delivered by Lord Mansfield as preserved by the two reporters is here reproduced. The reporter Burrow makes the court say: "We are all clearly of opinion that in this kind of action, an action for criminal conversation with the plaintiff's wife, there must be evidence of a marriage in fact; acknowledgment, cohabitation, and reputation are not sufficient to maintain this action. But we do not at present define what may or may not be evidence of a marriage in fact. This is a sort of criminal action; there is no other way of punishing this crime at common law. It shall not depend upon the mere reputation of a marriage, which arises from the conduct or declarations of the plaintiff himself. In prosecutions for bigamy, a marriage in fact must be proved."

Sir William Blackstone's report of the case ascribes the following language to the court: "In these actions there must be proof of a marriage in fact, as contrasted to cohabitation and reputation of marriage arising from thence. Perhaps there need not be strict proof from the register, or by a person present at the wedding dinner, if the register be burnt, and the parson and clerk are dead. This action is by way of punishment; there the court never interfere as to the *quantum* of damages. No proof shall arise in such case from the parties' own act of cohabitation. The case of bigamy is stronger than this; and on an indictment for that offense, Dennison, J., on the Norfolk circuit, ruled that though a lawful canonical marriage need not be proved, yet a marriage in fact, whether regular or not, must be shown. Except in these two cases, I know of none where reputation is not a good proof of marriage."

Neither of these opinions determines what is sufficient evidence of a marriage in fact; and so far as the proof of marriage in trials for bigamy is passed upon, this case is not authority for saying that the marriage must be so positively proved that nothing is to be left to inference. It is here that the difficulty arises. First, in regard to reputation, it is generally conceded that repute or general reputation alone is not legal proof of marriage in criminal cases: *Morgan v. State*, 11 Ala. 289; *Buchanan v. State*, 55 Id. 154; *Wood v. State*, 62 Ga. 406; *Harman v. Harman*, 16 Ill. 85; *People v. Miner*, 58 Id. 59; *Arnold v. State*, 53 Ga. 574; and text-books above cited. And this is highly reasonable, for a man ought not to be convicted upon evidence that he is reputed to be married, without further evidence of cohabitation, and that the former alleged wife is still alive and not divorced. But in Massachusetts and Minnesota it is enacted by statute that general repute is competent evidence of marriage in any court: Gen. Stat., c. 106, sec. 22; *Commonwealth v. Holt*, 121 Mass. 61, an indictment for adultery; *State v. Armington*, 25 Minn. 29, a prosecution for polygamy.

Whether general repute accompanied by evidence of cohabitation is sufficient, is a question upon which the courts are more at variance. In the absence of statute, many decisions are that such evidence is not adequate, *Miner v. People*, 58 Ill. 59; *Miller v. White*, 80 Id. 580; *Harman v. Harman*: 16 Id. 85; *State v. Rood*, 12 Vt. 296.

But in other states, general reputation, accompanied with evidence of cohabitation and of conduct, on the part of the defendant, holding himself out as a married man, has been deemed sufficient: *Buchanan v. State*, 55 Ala. 154; *Wood v. State*, 62 Ga. 406; *Commonwealth v. Jackson*, 11 Bush, 679; 21 Am. Rep. 225; *Commonwealth v. Holt*, 121 Mass. 61. And this we think to

be the proper rule. Actions on the part of a man tantamount to a confession, ought to be received as such, and it will be subsequently shown that an acknowledgment of marriage is competent evidence, though formerly not so considered. Moreover, there is here a question of presumptions which ought not to be disregarded. It seems at war with good sense to presume on trials for bigamy, for example, that a man living in the public relation of husband with a woman, is nothing more than committing open fornication with her. Where a man can be shown to have held himself out as the husband of a woman, he ought to be made to abide by that declaration. It is better for public morals that a man should, even for the purposes of criminal prosecution, be deemed the husband of a woman with whom he has consorted as husband, than that the law should assume that he was but living in lewdness with her, and permit him to take upon himself other marital obligations. Again, in civil proceedings the presumption is in favor of marriage, for the benefit of children, that these innocent third persons should not be pronounced bastard. The presumption is not so much for the man's benefit as it is for these third persons—and it ought not to be invoked for his protection in criminal trials, where the result of such presumption is the subversion of public morals. A man ought to be estopped to say that she is not his wife with whom he has lived as husband, towards whom he has assumed the duties of such relation, and by whom he has brought children into the world.

The evidence arising from confessions next demands attention. It is noticeable that in Blackstone's report of *Morris v. Miller*, *supra*, nothing is said in this respect, whereas in Burrow's report it is directly passed upon. True it is that the facts show that it was the effect of the acknowledgment of the defendant that was the point in issue. But be that as it may, recent adjudications have settled the matter, in this country at least, as will appear from the following excerpt from the opinion of Judge Woods in the case of *Miles v. United States*, 103 U. S. 304, 311: "On an indictment for bigamy the first marriage may be proved by the admissions of the prisoner, and it is for the jury to determine whether what he said was an admission that he had been legally married according to the laws of the country where the marriage was solemnized: *Regina v. Simonsto*, 1 Car. & K. 164. And it is stated in *Miles v. United States*, 103 U. S. 304, 311, that the same view is sustained by the following cases: *Regina v. Upton*, cited in 1 Russ. on Crimes (Greaves' ed.), 218; *Duchess of Kingston's case*, 20 How. St. Trials, 355; *Truman's case*, 1 East's P. C. 470; *Oayford's case*, 7 Me. 57; *Ham's case*, 11 Id. 391; *State v. Libby*, 44 Id. 469; *State v. Hilton*, 3 Rich. (S. C.) 434; *State v. Britton*, 4 McCord, 256; *Warner v. Commonwealth*, 2 Va. Cas. 595; *Norwood's case*, 1 East's P. C. 470; *Commonwealth v. Murtagh*, 1 Ashm. (Pa.) 272; *Regina v. Newton*, 2 Moo. & R. 503; *State v. McDonald*, 25 Miss. 176; *Wolverton v. State*, 16 Ohio, 173; *State v. Seale*, 16 Ind. 352; *Quin v. State*, 46 Id. 725; *Arnold v. State*, 53 Ga. 574; *Cameron v. State*, 14 Ala. 546; *Brown v. State*, 52 Id. 338; *Williams v. State*, 44 Id. 24; *Commonwealth v. Jackson*, 11 Bush, 679." And so also *State v. Medbury*, 8 R. I. 543; *State v. Landers*, 30 Iowa, 582; *Langtry v. State*, 30 Ala. 536.

We can not refrain from quoting in this connection the clear and able examination of this subject by Judge Cofer in the course of the court's opinion as delivered by him in *Commonwealth v. Jackson*, 11 Bush, 679; S. C., 21 Am. Rep. 225. It explains away what has been the basis of many decisions adverse to the admission or conclusiveness of the prisoner's confessions in criminal cases.

"The American cases in which it has been held that evidence of such decla-

rations, confessions, and conduct, is not admissible, or, if admissible, is not of itself sufficient to warrant conviction, seem to rest on the authority of *Morris v. Miller*, 4 Burr. 2056, and *Birt v. Barlow*, Doug. 171. These were actions for crim. con. in which the plaintiffs attempted to establish their marriages by giving in evidence their own declarations, and proving their recognition of, and cohabitation with, the women alleged to be their wives. In the former case Lord Mansfield said: 'There must be evidence of a marriage in fact; acknowledgment, i. e., acknowledgment of the husband by the wife—cohabitation and reputation are not sufficient in this action.' And he gives his reasons for so holding. 'It shall not depend,' said he, 'upon the mere reputation of a marriage which arises from the conduct or declarations of the plaintiff himself.' Again he says: 'No inconvenience can possibly arise from this determination. But inconvenience might arise from a contrary decision which might render persons liable to actions founded on evidence made by the persons themselves who should bring the actions.' And twelve years later, in deciding the case of *Birt v. Barlow*, he gave the same reasons for a like decision. And this additional reason seems to us to be entitled to considerable weight in support of the rule announced by Lord Mansfield in those cases, and by this court, in the case of *Kibby v. Rucker*, 1 A. K. Marsh. 290, as applicable to actions for crim. con. In such cases the plaintiff knows when, where, and by whom he was married, and at least some of the persons who were witnesses of the fact, and generally has it in his power to offer direct and positive proof. But the case is often quite otherwise with the government in prosecutions for bigamy. The prosecuting officer must be wholly ignorant, often, of the time and place of the prisoner's first marriage, of the names and residence of those present at its consummation, and the avenues of information will generally be closed to him, especially when the first marriage took place, as is generally the case with bigamists in some other state or country. Another difficulty in the way of the government under the rule that the first marriage must be established by record evidence or by the testimony of one or more witnesses present at the marriage, and which does not exist in actions for crim. con., is that the government can not read the depositions of witnesses, and may be unable to procure the attendance of those residing out of the state, while the plaintiff in crim. con. may procure and read depositions to prove the fact of his marriage.

"But Lord Mansfield did not say in *Morris v. Miller*, as some have supposed, that a prisoner's words and conduct could not be given in evidence against him to prove, in a prosecution for bigamy, the fact of his having been previously married, or that such evidence would not of itself authorize a conviction. He said, it is true, that 'in a prosecution for bigamy a marriage in fact must be proved;' and this we do not for a moment doubt is now and has always been the law; but Lord Mansfield goes on to say, 'We do not at present define what may or may not be evidence of a marriage in fact,' and thus left open the very question which he has been quoted as deciding, which, as already stated, seems to be the foundation upon which the American cases rest which hold that direct and positive proof is required. That Lord Mansfield did not mean to decide that a marriage in fact could not be proved by evidence of the declarations and conduct of the prisoner, is not only clear from the case in which he has been supposed to have made that decision, but is further shown by his decision in *Mary Norwood's case*, 1 East's Crim. L. 337, where he, with the concurrence of Lord Chief Justice Parker and Justices Smythe, Bathurst, and Parrot, determined that seven years' cohabitation and several admissions by the prisoner that a person was her husband, by calling

him by that appellation, was not only competent, but sufficient evidence to prove a marriage in fact." And see 2 Whart. Crim. L., sec. 1700.

The law, anxious to preserve the domestic happiness of husband and wife, has ordained, as a general rule, that one can not be made a witness against the other. Not questioning the wisdom of this policy in civil, and perhaps in most criminal cases, it may be nevertheless doubted whether, in proceedings involving the existence of a marriage and of crimes against that relation, the general principle has not been pushed too far. A conspicuous example is fresh in the minds of our people, where a polygamist was sought to be convicted on the testimony of one of his wives. The supreme court of the country reversed the decision, for the reason that this wife should not have been permitted to testify. The ruling was certainly correct, as the court was obliged to be governed by the law; it is the law in this particular that we condemn. While admitting that polygamous marriages of the kind before the court were contracted in secrecy, and extremely difficult to be proved, the court was compelled notwithstanding to apply the rule of law preventing a wife from testifying against her husband. The conclusion reached by the court in the case adverted to, *Miles v. United States*, 103 U. S. 304, 315, is: "The result of the authorities is, that as long as the fact of the first marriage is contested, the second wife can not be admitted to prove it. When the first marriage is duly established by other evidence to the satisfaction of the court, she may be admitted to prove the second marriage, but not the first, and the jury should have been so instructed." The reasoning of the court employed, in arriving at this determination, is embodied in the following: "The ground upon which a second wife is admitted as a witness against her husband in a prosecution for bigamy is, that she is shown not to be a real wife by proof of the fact that the accused had previously married another wife, who was still living and still his lawful wife. It is only in cases where the first marriage is not controverted, or has been duly established by other evidence, that the second wife is allowed to testify, and she can then be a witness to the second marriage, and not to the first. The testimony of the second wife to prove the only controverted issue in the case, namely, the first marriage, can not be given to the jury on the pretext that its purpose is to establish her competency. As her competency depends on proof of the first marriage, and that is the issue upon which the case turns, that issue must be established by other witnesses before the second wife is competent for any purpose. Even then she is not competent to prove the first marriage, for she can not be admitted to prove a fact to the jury which must be established before she can testify at all."

This case clearly demonstrates the folly of the law in this particular. The general rule itself is based upon reasons of public policy designed to encourage and preserve confidence between man and wife, to the end that their individual happiness and welfare may be promoted, resulting eventually in the welfare of society at large. This spirit is appreciated and commended, but in the face of the infringement of public laws another view demands recognition, and that is that the happiness of the individual is to give way to the general good. Not to say how far this view is to be carried, it is insisted that at least in prosecutions for bigamy and for adultery the wife should be made a competent witness to testify to that which she, besides the husband, knows better than any one else, and of which, except her husband, she alone may have knowledge. This consideration has especial weight in prosecutions for polygamous marriages as contracted in Utah.

Thus far we have discussed the questions of evidence arising out of the acts and declarations of the immediate parties to the marriage. Other meth-

ods of proof next demand attention. The testimony of a witness present at the marriage is ordinarily admissible and adequate proof unless the law requires official evidence: *Commonwealth v. Norcross*, 9 Mass. 492; *Arnold v. State*, 53 Ga. 574; *Langtry v. State*, 30 Ala. 536; *Murphy v. State*, 50 Ga. 150; *Wolverton v. State*, 16 Ohio, 174; *Warner v. Commonwealth*, 2 Va. Cas. 95, an able opinion, reviewing also other propositions involved, by Judge White; *State v. Williams*, 20 Iowa, 98; 1 Bish. on Mar. and Div. sec. 494; Whart. Crim. Ev., sec. 173. In *Bird's case*, 21 Gratt. 800, 807, Judge Staples, speaking for the court, said: "Although the testimony of a witness present at the marriage may not be as conclusive or satisfactory as the confession of the party, there is no solid reason for rejecting it as incompetent. There is no technical rule forbidding the reception of such evidence. When a witness testifies to a marriage in a foreign state, solemnized in the manner usual and customary in such state by a person duly authorized to celebrate the rites of marriage, and the parties afterwards lived together as man and wife, this is as satisfactory evidence of a valid marriage as could be expected or desired, and in such case it is not necessary to prove the laws of such state, or to offer further evidence of a compliance with its provisions." The officiating clergyman may be a witness to prove the marriage: *State v. Goodrich*, 14 W. Va. 834; *Warner v. Commonwealth*, 2 Id. 95; *Bird v. Commonwealth*, 21 Gratt. 800; *State v. Abbey*, 29 Vt. 60.

In the principal case, the evidence of the marriage was pronounced insufficient because the official character of the person performing the ceremony was not shown. But this case can be considered sound law only in this view; that there was no evidence that the party celebrating the marriage had any authority whatever so to do, and that consensual marriages were not recognized as valid in the place where this one was contracted. The better rule is that stated by Judge White in *Warner's case*, 2 Va. Cas. 95, 104: "It does, therefore, seem to me, upon the reason and necessity of the case alone, if there were no authorities upon the subject, that where the first marriage was established out of the state by a person, who from all the circumstances of the case, must reasonably be presumed to have filled a character authorizing him to do so, and who was recognized as the proper officer by the person accused himself, and the company present at the time, and further proof that after the ceremony, the parties lived publicly together as man and wife, it is as good evidence as in such a case a prosecutor can reasonably be expected to produce, and if not impugned by other testimony, is proper, competent, and sufficient evidence, so far as such fact goes to convict the accused." No further evidence of the official character of the person performing the marriage ceremony need be given than that he was a person assuming and believed to have authority: *Bird v. Commonwealth*, 21 Gratt. 800; *Murphy v. State*, 50 Ga. 150; *State v. Abbey*, 29 Vt. 60; *State v. Kean*, 10 N. H. 347; *State v. Clark*, 54 Id. 443; *Rex v. Brampton*, 10 East, 282. And the usual proof in respect to the authority to perform the ceremony is that the person was in the habit of acting or had acted in that capacity: Same citations; *State v. Winkley*, 14 N. H. 490.

The certificate of marriage when properly authenticated may be given in evidence: *Murphy v. State*, 50 Ga. 150; *Arnold v. State*, 53 Id. 574; *State v. Colby*, 51 Vt. 291. But as this is not a document that authenticates itself, *State v. Colby*, 51 Vt. 291; *State v. Horn*, 43 Id. 20, the signature of the minister must be proved: Id. And when the prosecution relies upon a foreign certificate of marriage, such certificate must be shown to have been kept in pursuance of law, and signed by a person who had charge of such records: *State v. Dooris*, 40 Conn. 145. By reason of the difficulty of thus establish-

ing the genuineness of the record and of the further necessity of proving the identity of the parties, such certificates are not as desirable evidence as the testimony of witnesses.

In proving a marriage which has taken place abroad, evidence must be given of the law of the foreign state in order to show validity: Roscoe's Crim. Ev., sec. 326. It is now settled, that aside from an exemplified copy of these laws, the officiating clergyman or person acquainted with the law by reason of his profession may testify regarding it: *The Sussex Peerage case*, 11 Cl. & Fin. 134; *Reg. v. Savage*, 13 Cox's C. C. 178; 14 Moak, 632; Whart. Crim. Ev., sec. 173. In the absence of proof of the foreign law the presumption is that consensual marriages are valid according to it, and may be proved accordingly: *Id.*; *Hutchins v. Kimmel*, 31 Mich. 126; 18 Am. Rep. 164. Of course, in order to convict the accused of crime by reason of an alleged marriage abroad, it is necessary to establish that marriage. But the law is reasonable in this respect and does not demand exact proof. Should it appear that by the *lex loci* certain preliminary acts were requisite to a valid marriage, the law will presume that these steps were regularly taken if the ceremony be shown: Roscoe's Crim. Ev., sec. 323. But the presumption of regularity will not be entertained where the act sought to be established by such presumption and essential to the validity of the marriage, has no logical connection with admitted facts in the case. Thus a marriage according to the law of Prussia was charged. By this law it was necessary that a civil contract of marriage should be entered into before a civil magistrate before the religious ceremony, which was usually solemnized, should take place. The celebration of such religious ceremony without the civil marriage was prohibited under severe penalties. It was in proof in the case in question, that the religious ceremony had been performed; and from this fact the prosecution urged that the prior civil marriage should be presumed. This the court refused to do, there being no logical connection between the two facts, and for the further reason that by so doing they would, in presuming the innocence of the celebrator of the marriage, pronounce the accused guilty: *Weinberg v. State*, 25 Wis. 370.

THOMPSON v. THOMPSON.

[19 MAINE, 235.]

PARTY TO A DEED IS NOT PERMITTED TO PROVE that he has no title to the land conveyed, by virtue thereof, where the deed contains covenants or recitals inconsistent with the proof offered.

GRANTOR MAY FORTIFY HIS TITLE by a subsequent deed from his grantor to the premises originally conveyed, and is not estopped from claiming that the title passed by the prior conveyance, if by so doing he do not prejudice the rights of others.

DEED CAN NOT BE DEFEATED FOR ONE PURPOSE, and relied upon for another.

WENT of entry. The opinion states the facts.

Fairfield, for the plaintiff.

J. Shepley and Howard, for the defendant

By Court, TENNEY, J. Both parties claim under Benjamin

Thompson, sen. The demandant, by virtue of a levy of an execution issued upon a judgment in a suit, the basis of which was a bond to the judge of probate, executed by Benjamin Thompson, sen., and another as the sureties of one Ricker, the guardian of the demandant, dated October 2, 1820; and the defendant, by deeds dated June 15, and November 14, 1820, both of the same land, excepting that the one of November 14 embraced two acres more than the other, and both containing covenants of seisin and warranty. It is contended by the demandant, that the latter deed is an estoppel upon the defendant to say that he was seised previously to the date thereof, and that the demandant is allowed, as a creditor at that time, to impeach the same deed as fraudulent against him, being a creditor by virtue of a bond. It is well settled, that a party shall not be allowed to deny a fact, clearly stated in his deed—and also that he shall not be permitted to prove he had no title to land by virtue of a deed under which he holds, when it contains a covenant or recital inconsistent with the proof offered. In cases of dower, the latter principle has been applied: the tenant has been estopped to deny the seisin of the demandant's husband, when he has taken a deed from him containing a covenant of seisin, and when it appears he has relied upon that title. But in a claim for dower, it is not required to show a perfect title in the husband, seisin only being necessary. The same principle has extended to other cases. One has not been allowed to set up a title, derived from another previous to his own agreement to purchase of that other's grantee, if the conveyance should be made to such grantee: *Sayles v. Smith*, 12 Wend. 57 [27 Am. Dec. 117].

But denying and repudiating a title under which one holds, or refusing to be bound by a contract to hold under another made solemnly and with full understanding of all the circumstances, where rights have been acquired by others, by reason of such contract, is different from his supporting that title, and complying with his contract by other means, not inconsistent therewith. One may fortify an existing title, without putting it in jeopardy, if he do not prejudice the interests of others; and doing so, can not originate rights in strangers, where there was nothing before on which they could rest. Claiming under one conveyance, and denying effect to another, where he has entered and enjoyed under the latter, is widely distinguished, from his claiming under two conveyances from the same grantor. In 4 Pet. 83,¹ the court say: "It is laid down, that recitals of one

1. *Carver v. Jackson*.

deed in another bind parties. Technically, it operates as an estoppel, binding parties and privies, etc. It does not bind strangers, or those claiming by a title paramount to the deed; it does not bind persons, claiming by an adverse title, or persons claiming from the parties by title anterior to the reciting deed." "The grantee may be permitted to show that the grantor was not seised as is every day allowed in actions of covenant:" *Small v. Proctor*, 15 Mass. 495. "It is generally competent for the vendee to deny and disprove the seisin of the vendor:" *Ham v. Ham*, 2 Shep. 351. Covenants of seisin in this respect differ from covenants of warranty, the former do not prevent the grantor from setting up an after-acquired paramount title in himself: *Allen v. Sayward*, 5 Greenl. 227 [17 Am. Dec. 221]. Otherwise in covenants of warranty: 12 Johns. 201,¹ 13 Id. 316.² One is not estopped by accepting a deed of his own land, for this does not deny his former title, but may be done to silence adverse claims and to purchase his own quiet; "and every estoppel ought to be a precise affirmation of that which maketh the estoppel:" Co. Lit. 52 a. "One is not estopped when the thing is consistent with the record:" Com. Dig. E 3. "If any interest pass, there shall be no estoppel:" Com. Dig. a 1, B, E 2, E 4, E 8; Co. Lit. 352 a, 45 a. It is a general rule, that when there is anything for the warranty to operate upon, the doctrine of estoppel will not apply: *Jackson et al. v. Hoffman*, 9 Cow. 271.

In the case at bar, the jury have found by their verdict, the question being submitted to them without objection, that the deed of June 15 was executed and delivered at the time it was dated—that passed all the grantor's title, and none was remaining in him, when he executed the probate bond, which is the origin and basis of the demandant's claim. The defendant does not repudiate his deed of November 14, but holds two acres by that alone, on which all the covenants therein must operate. Receiving this deed, interfered with no existing rights, is not and could not be a cause of complaint with any one; so far from it the demandant resorts to it as the foundation of his title to the land therein described. It gave no rights inconsistent with those established by the deed of June 15, so far as it embraced the same land, nor did it take away any; so far, it in no respect changed the relation of the parties. A stranger to the first deed, having on no principle any authority to contest its validity, until after the title had wholly passed from the grantor, seeks to

1. *Jackson v. Murray*.2. *Jackson v. Stevens*.

avail himself of a doctrine, which being denied him, takes away no interest, which in any manner had previously attached.

It is not perceived that the demandant is in any better situation than he would have been, if he had taken Benjamin Thompson senior's deed under his own seal after the conveyance of June 15, and before that of November 14, having notice of the first deed. Such a deed as is supposed, to the demandant, would confer no rights till after the second deed to the defendant, and then the former could succeed to none, which his supposed grantor would not have possessed, so far as they relate to the seisin previous to November 14. If the defendant is estopped to deny the seisin of his grantor previous to the deed of November 14, in consequence of taking it, that estoppel could not operate to the advantage of the demandant any more than it would to that of the one whose interest he claims. Could the grantor say, after the fourteenth of November, that the defendant was precluded from saying the seisin was in himself after June 15? If he should claim the benefit of this principle, would it not be an answer to him, that his deed of June 15 was an equal estoppel, to shut his mouth? "Estoppel against estoppel doth put the matter at large:" Co. Lit. 252 b. One can not maintain an action on a covenant of seisin by showing the seisin in himself; "the covenant of seisin extends only to guarantee the bargainee against any title existing in a third person, and which might defeat the estate granted:" *Fitch v. Baldwin*, 17 Johns. 161. One can not allege seisin in himself after he has, by his own deed, parted with it. "It would be contrary to the established principles, that a grantor can not by his own actions or declarations, defeat a deed, which he has before made to one, who is claiming and holding under him:" *Barrett v. Thorndike*, 1 Greenl. 79. "It would seem to be unjust, and contrary to the intent of the grantee, to affect his rights by his acceptance of a deed beyond the rights and interests which should actually pass by it:" *Flagg v. Mann*, 14 Pick. 482.

The error of the presiding judge, complained of, was, in submitting to the jury, the question in his instructions, whether the reason for taking the conveyance of November 14, was for the purpose of carrying into effect the agreement as to the two additional acres, and whether that was honestly and fairly done without any fraudulent intent. They have answered in the affirmative by their general verdict, and we do not find, that the doctrine of estoppel has been applied in any case analogous to the present; and as the question of intention in executing a

deed or release, has been considered by the courts to be one for the jury and not for them, where it would seem to be for the determination of the latter, with as much propriety as the one arising in this case, we do not feel authorized or required to extend the principle to suits not clearly within its legitimate operation: *Fox et al. v. Widgery*, 4 Greenl. 214.

On another ground, we think this verdict can be well sustained. The demandant's title rests upon the assumption, that the deed to the defendant, of November 14, was fraudulent as against him, and therefore void. If not fraudulent against him, he can not contest its operation to convey the land to the defendant. Can he say that the deed which is void against him, admits him by its recitals and covenants to hold land in opposition to what is the truth? Shall he say, the covenants of seisin allow him to come in, and when in, to deny the whole effect of that same covenant of seisin? Is it for him, in this manner, to silence the voice, which honestly and fairly proclaims the title in the defendant? If he attempts to hold, solely, by showing a deed to be fraudulent, does not the very doctrine, which he invokes in his support, dislodge him from such a position? Shall he say, a deed void entirely as against him, contains in it, that without which he has no pretense of title? He can not be permitted to defeat the deed for one purpose, and set it up for another: *Crosby v. Chase*, 5 Shep. 369. In any view, which we are able to take of the case, we see nothing which leads us to doubt that the verdict was properly returned for the defendant.

Judgment on the verdict.

STACY v. FOSS.

[19 MAINE, 335.]

MONEY PAID TO THE WINNER OF A WAGER, the parties being *in pari delicto*, can not be recovered back, unless made recoverable by statute.

STAKEHOLDER OF A WAGER, WHERE THE MONEY HAS NOT BEEN PAID over to the winner, is liable to the loser, upon notice and demand, for the amount by him deposited.

ASSUMPSIT, to recover a sum of money deposited with the defendant, as stakeholder, on a bet on a horse-race. Before the defendant had paid over the money, the plaintiff, who had lost the bet, notified him not to do so, and demanded a return of the amount deposited by him. Plaintiff was nonsuited, to which ruling an exception was taken.

E. Fuller, for the plaintiff.

May, for the defendant.

By Court, WESTON, C. J. It is conceded, that the bet out of which this controversy grew, is not a valid contract. And it has been decided by this court, that all wagers in this state are unlawful: *Lewis v. Littlefield*, 15 Me. 233. The action, however is resisted on the ground, that the stakeholder is a party to the unlawful contract, and that both plaintiff and defendant being *in pari delicto*, the law will lend its aid to neither. And a distinction is taken between notice to the stakeholder, repudiating and disaffirming the contract, before and after the happening of the event, upon which the wager is made to depend. When the money has been once paid over to the winner, unless where made recoverable by statute, the parties being clearly *in pari delicto*, no action can be maintained to recover it back: *Howson v. Hancock*, 8 T. R. 575; *McCullum v. Gourlay*, 8 Johns. 147. But where the money has not been paid over by the stakeholder, although it has been lost, by the happening of the event, it has been held, that upon notice and demand, the stakeholder is liable to the loser, for the amount by him deposited: *Cotton v. Thurland*, 5 T. R. 405; *Lacaussade v. White*, 7 Id. 535.

The case of *Yates v. Foote*, 12 Johns. 1, has been cited for the defendant, where it was held that after the event has happened, no action will lie by the loser against the stakeholder, upon notice and demand, while the money remains in his hands. And in *McKeon v. Caherty*, 3 Wend. 494, the law is stated to have been thus settled, by the case of *Yates v. Foote*. That was a decision of the court for the correction of errors, fifteen to six, against the unanimous opinion of the supreme court, delivered by chief justice Kent. It was one of five cases depending upon the same facts and principles, in one of which, *Vischer v. Yates*, 11 Johns. 23, the judgment of the supreme court is reported. Kent, C. J., there reviews the English cases, and he thence deduces, that an action may be maintained against the stakeholder upon notice and demand, before he pays over the money, as well after as before the happening of the event. To this result, as sound and correct, is added the undivided opinion of the supreme court of New York. The rule, that no action lies, where the parties are *in pari delicto*, was interposed. The learned chief justice says: "This objection is applied exclusively to the suit against the principal or winner; and there is no instance in which it has been used as a protection to the intermediate stakeholder,

who, though an agent in the transaction, is no party in interest to the illegal contract."

It best comports with public policy, to arrest the illegal proceeding, before it is consummated; and in our judgment, the opinion of the supreme court is better sustained, upon principle and authority, than that of the court of errors. The nonsuit, ordered by the court below, is not warranted by the law of the case.

Exceptions sustained.

ACTION DOES NOT LIE TO RECOVER MONEY LOST IN GAMING: *Downs v. Quarles*, 12 Am. Dec. 337, and note; *Hudspeth v. Wilson*, 21 Id. 344; *Babcock v. Thompson*, 15 Id. 235; *Bell v. Parker*, 23 Id. 55.

RECOVERING MONEY PAID ON LOTTERY TICKETS: See *Gray v. Roberts*, 12 Am. Dec. 383.

STAKEHOLDER IS LIABLE FOR MONEY PAID OVER: *McAllister v. Hoffman*, 16 Am. Dec. 556, and note.

FOGG v. VIRGIN.

[19 MAINE, 352.]

MAKERS OF A PROMISSORY NOTE WHO DESCRIBE THEMSELVES in the body of the instrument as trustees of an unincorporated association, but who sign the same in their individual capacity, are personally bound thereby. OBJECTION THAT ALL THE MEMBERS OF AN UNINCORPORATED ASSOCIATION are not joined in an action on a promissory note given for its benefit, must be by plea in abatement.

ASSUMPSIT on the following note: "For value received, we, the trustees of the Wayne Scythe company, promise to pay Asa Gile, or his order, one hundred and seventy-three dollars and thirty-seven cents, to be paid in one year from date, and interest. Uriah H. Virgin, Comfort C. Smith, Ezra Fisk." It was admitted that the above note was executed by the defendants, and indorsed to the plaintiff, and that defendants, with several others, had associated themselves, under the name of the Wayne Scythe company, but had never incorporated; and further, that the defendants had been chosen, and at the time the note was given, were acting, as the "trustees" of the association.

Emmons, for the defendants.

Howe, for the plaintiff.

By Court, WESTON, C. J. The defendants sign as individuals, affixing to their names nothing indicating a representative capacity. They describe themselves, in the body of the instru-

ment, as trustees of the Wayne Scythe company; but they do not profess to promise in their behalf. It is a mere description of themselves, of which many examples may be found, where the persons, signing or executing instruments, have been held personally bound: *Thacher et al. v. Dinsmore*, 5 Mass. 299 [4 Am. Dec. 61]; *Foster v. Fuller*, 6 Id. 58; *Tuft v. Brewster et al.*, 9 Johns. 334 [6 Am. Dec. 280]; *Stone v. Wood*, 7 Cow. 453; [17 Am. Dec. 529]; *Hills v. Bannister et al.*, 8 Cow. 31; *Burrell v. Jones et al.*, 3 Barn. & Ald. 47; *Eaton v. Bell*, 5 Id. 34. In the cases cited for the defendants it is manifest that the actual signers of the instruments adduced in evidence, were acting in behalf of others, whom they intended to bind, without assuming any personal responsibility. The distinction is well illustrated in the case of *Barker v. The Mechanic Ins. Co.*¹ The defendants were attempted to be charged on a note, in these words: "I, John Franklin, president of the Mechanic fire insurance company, promise to pay to the order, etc., for value received. John Franklin." He was held personally bound, and not the company. And it was further held, that the legal effect would have been the same if the same description of himself had been added to his signature. The court say: "He describes himself as president of the company, but to conclude the company by his acts, he should have contracted in their name, or at least in their behalf."

But if the company are bound here, and such was the intention of the contract, the plaintiff is entitled to judgment. The company are not incorporated, and have therefore no corporate name by which they can sue and be sued. They are a voluntary association of individuals. The case finds that the defendants were members of the company at the time the note was made. If other members should have been sued, they should have disclosed their names and taken advantage of the objection by a plea in abatement. Trustees of ministerial and school fund in *Dutton v. Kendrick*, 3 Fairf. 381.

Judgment for the plaintiff.

Followed in *Barlow v. Congregational Soc. in Lee*, 8 Allen, 463; *Powers v. Briggs*, 79 Ill. 495.

SIGNING NOTE BY AGENT: See *Long v. Colburn*, 6 Am. Dec. 160; *Pentz v. Stanton*, 25 Id. 558, and note; *McClure v. Bennett*, 12 Id. 223, where the trustees of a corporation were held personally liable on a promissory note signed and sealed by them individually: *Barker v. Mechanic Ins. Co.*, 28 Id. 664.

1. 3 Wend. 94; 8 C. C., 20 Am. Dec. 664.

PERRIN v. KEENE.

[19 MAINE, 255.]

PARTNER AUTHORIZED TO SETTLE AND ADJUST the copartnership affairs, can not make new contracts, or create new liabilities, as by giving promissory notes binding on the firm.

PROMISSORY NOTE GIVEN IN SETTLEMENT of an account, is only *prima facie* evidence of a discharge, and is open to explanation.

AMENDMENT WILL BE ALLOWED in a suit upon an invalid promissory note, given in settlement of an account, by incorporating a count upon the original indebtedness.

ASSUMPSIT on three promissory notes. Defendants had been partners, under the name of Keene & Weston, but had dissolved on November 12, 1837. Upon dissolution, Weston was authorized to settle and adjust its affairs. He gave the notes in question, signed by the firm name, to plaintiffs, in settlement of their account, without the express authority of his partner. Upon the trial, plaintiffs asked leave to amend their declaration, by setting forth the original indebtedness. Upon the foregoing facts the rights of the parties were submitted to the court.

J. H. Williams, for the plaintiffs.

Voss and Lancaster, for the defendants.

By COURT. Weston had no right to sign the notes in suit in the name of the firm, unless he derived it from the authority given him to settle and adjust the copartnership business. This does not give him any power to make new contracts, or to create new liabilities, binding on the firm. No such power can be derived from the agreement that Weston should settle and close the business of the firm. The notes, then, are made and delivered, without authority, and are not valid against the firm.

Is the account still existing, and may it properly be introduced into the writ by way of amendment, by adding a new count for that purpose? In England and New York a note given on the settlement of an account is not a discharge of such account. In this state and in Massachusetts it is otherwise. But in these states it is held to be only *prima facie* evidence of a discharge, and, of course, is open to explanation. Hence in *Vanclee v. Therasson*, 3 Pick. 14, it was held that when a note was given in New York, in discharge of an account, and the suit was commenced on the account in New York, that the plaintiff could not, under leave to amend, file a count on the note, because it was a new and distinct cause of action. The note, by the law of New York, not being a payment, did not discharge

the account. But in *Ball v. Clafin*, 5 Id. 303 [16 Am. Dec. 407], with perfect consistency, it was held that the giving of a new note is not a payment, and that both may be considered as the same cause of action. So in this state, in *Newall v. Hussey* [ante, 717], in the county of Lincoln, it was held that when an account is sued and a note had been given for it, that the note could not come in by way of amendment, being a new cause of action. This note, given without authority, does not extinguish the account. If it did it would be a new cause of action. If not, then the account remains the same subsisting demand, and may be brought in by way of amendment: 5 Pick. 303. If the notes were given without authority, they were not a payment of the debt, and the account remains undischarged. It may be said that the note binds the agent or partner who made it, even if he undertakes to use the copartnership name without authority. The answer is, it can bind him alone, and the plaintiffs did not intend to take the note of Weston alone. They meant to have the security of the copartnership. The note, then, being the note of Weston alone, the presumption of payment is rebutted.

The notes having been declared on as the contracts of the parties sued, and being for the same subject-matter as the account, and not having the legal effect to discharge the account, the amendment may be rightfully made.

The defendants must be defaulted.

Followed in *Parham Sewing-machine Co. v. Brock*, 113 Mass. 196.

PARTNER EMPOWERED TO SETTLE AFFAIRS OF FIRM on its dissolution can not bind his copartners by creating a new debt: *Nott v. Downing*, 26 Am. Dec. 491; *Wilson v. Torbert*, 21 Id. 632; *Rootes v. Wellford*, 6 Id. 519, and note; *Chardon v. Oliphant*, Id. 572, and note.

INHABITANTS OF PHILLIPS v. INHABITANTS OF KINGFIELD

[19 MAINE, 375.]

IMPEACHMENT OF WITNESS.—PARTICULAR ACTS OF IMMORALITY or crime can not be testified to for the purpose of impeaching a witness; general character for truth can only be inquired into.

GENERAL CHARACTER FOR TRUTH MAY BE PROVED as a fact, and the jury are then to form their own opinion respecting the witness' credibility.

FORM OF INTERROGATORY IN SUCH CASE, may be whether the person testifying knows the general character of the witness, and if so, what is his general reputation for truth.

CROSS-EXAMINATION IN SUCH CASE may extend to the opportunity for knowing the witness' character, for how long and how generally unfavorable reports prevailed, and from whom they were heard.

RESIDENCE IS CHANGED where a man goes away with a determination of taking up a permanent residence in a particular place and does so take up his abode. Residence may be abandoned without evidence that another has been secured; but it is otherwise as to the place of legal settlement.

EXPRESSION OF OPINION ON THE STATE OF FACTS by the lower court is not matter of legal exception.

TO IMPEACH A WITNESS it is not allowable to ask another if he would believe the witness under oath.

ASSUMPSIT for supplies furnished the wife and daughter of one Isaiah Wood. General issue and joinder. Conflicting evidence as to the place of settlement of Wood, and in regard to the various places of his residence between January, 1816, and March, 1821, was introduced. The plaintiffs then called Wood, and defendants gave evidence tending to show that his character for truth and veracity was not good. Emery, J., presiding, instructed the jury as follows. 1. Where a party attempts to impeach a witness, that party can ask only what is his general character for truth and veracity; but the other party may ask his character under oath and to the belief which the one testifying would entertain of the one under oath, who is attempted to be impeached, and confine it to that. 2. If a man has a home, a temporary absence to seek employment does not take it away. 3. If a man go away with a determination of taking up a permanent residence in a particular place and does so take up his abode, his former residence is changed. 4. The testimony of the supplies furnished the wife of said Wood, is of no other use than as helping to show an intention to abandon his wife in leaving her unprovided; because the mere circumstance of supplies would not change the effect of the act of 1821, inasmuch as he had no control over the members of his family at the time. Exceptions to these instructions were taken and allowed.

Tenney, for the defendants.

Wells, *contra*.

By Court, **SHEPLEY, J.** One of the questions presented relates to the manner of examining a witness, who is introduced to prove that another witness is unworthy of credit. The authors of the elementary treatises on evidence do not perfectly agree in this matter; and the cases upon which they rely for their statements, are generally those arising at *nisi prius*, where there was little examination or discussion of principle. The rule as stated by Peake is, that "*viva voce* evidence to destroy the credit of a witness must be that of persons, who have known

his general character, and who take upon themselves to swear from such knowledge, that they would not believe him upon his oath:" Peake's Ev. 88. The rule as stated by Phillips, is in substance the same. He says, "the regular mode is to inquire whether they have the means of knowing the former witness' general character, and whether from such knowledge they would believe him on his oath:" 1 Ph. Ev. 229.

Starkie says, "the proper question to be put to a witness for the purpose of impeaching the general character of another is, whether he could believe him on his oath? When general evidence of this nature has been given to impeach the character of the witness, the opposite party may cross-examine as to the grounds upon which that belief is founded:" 1 Stark. Ev., ed. by Met. 182. It will be perceived that the language of the last rule does not limit the witness to his knowledge of the character of the former witness for truth, but permits him to form his opinion from any knowledge, belief, or reputation, that the former witness has committed some crime, or been guilty of some immorality. And accordingly it has been held in North Carolina and Kentucky, that a party is not confined to the reputation of the former witness for veracity, but may impeach his general moral character. Under a literal application of the rule as stated by Starkie, the witness can form a law to suit himself as to what degree of moral delinquency shall be sufficient to destroy the credit of the former witness, and can apply his own law as his personal prejudices, errors, griefs, or interest may dictate. And if the opposite party may inquire into the grounds, upon which his belief is founded, the result is, that every description, and every act of private vice and immorality and the prevailing suspicion of them, even if slanderous, may be introduced into a court of justice, and that against one who is neither called upon, nor prepared to meet them. It is however a well-established rule, that no particular acts of immorality or crime can be stated. It would be productive of much wrong to individuals as well as degrading to the administration of justice to expose within its halls the private vices and immoral acts by reputation connected with the characters of witnesses.

In the case of *Carlos v. Brook*, 10 Ves. 50, the lord chancellor says it had been decided to be competent to examine any witness to the point, whether he would believe that man upon his oath. It is not competent, even at law, to ask the ground of that opinion, but the general question only is permitted. The rule, as

stated by Swift, is more satisfactory and less liable to abuse in practice. He says, the only proper questions to be asked are, whether he knows the general character of the witness in point of truth among his neighbors, and what that character is, whether good or bad. And states, that his testimony must be founded on the common repute as to truth, and not as to honesty: Swift's Ev. 143.

One acquires a character for truth or the reverse, as he does for honesty, or chastity, or temperance, or the reverse. And it is this trait of character as a fact, that should be placed before a jury for their consideration in weighing the testimony. The opinions of a witness are not legal testimony except in special cases; such, for example, as experts in some profession or art, those of the witnesses to a will, and in our practice, opinions on the value of property. In other cases, the witness is not to substitute his opinion for that of the jury; nor are they to rely upon any such opinion instead of exercising their own judgment, taking into consideration the whole testimony. When they have the testimony that the reputation of a witness is good or bad for truth, connecting it with his manner of testifying, and with the other testimony in the case, they have the elements from which to form a correct conclusion, whether any and what credit should be given to his testimony. To permit the opinion of a witness, that another witness should not be believed, to be received and acted upon by a jury, is to allow the prejudices, passions, and feelings of that witness, to form, in part at least, the elements of their judgment. To authorize the question to be put, whether the witness would believe another witness on oath, although sustained by no inconsiderable weight of authority, is to depart from sound principles and established rules of law respecting the kind of testimony to be admitted for the consideration of a jury, and their duties in deciding upon it. It, moreover, would permit the introduction and indulgence in courts of justice of personal and party hostilities, and of every unworthy motive by which man can be actuated, to form the basis of an opinion to be expressed to a jury to influence their decision.

The observations of justices Gibson and Duncan, in the case of *Kimmel v. Kimmel*, 3 Serg. & R. 336 [8 Am. Dec. 655] are just and appropriate. Mr. Justice Gibson says, "there is danger from the proneness so often observable in witnesses, to substitute their own opinion for that of the public, whose judgment can not be so readily warped by prejudice or feeling as that of the individual; and hence the policy of not requiring any inti-

mate degree of knowledge respecting the person himself, or of bringing the witness too close to the scene. The reputation of the neighborhood is the only thing that is competent; and if the witness has acquired a knowledge of it by the report of the neighborhood, he is exactly qualified to be heard." Mr. Justice Duncan says, "opinion will not be evidence, for if it were, no witness would be safe from the shafts of calumny. No man is to be discredited by the mere opinion of another." In *Wike v. Lightner*, 11 Serg & R. 198, Tilghman, C. J., says, "the law on this subject is accurately laid down in *Kimmel v. Kimmel*. In order to discredit a witness, you can examine only to his general character;" and again, you must never depart from general character." As to the question, whether he would believe the other witness on oath, he says, "a direct answer would not be objectionable, provided the belief was founded on the witness' knowledge of his general character; otherwise, it would be nothing to the purpose." The mischiefs have to some extent been already stated, which might arise from permitting the witness to give his own opinion; and this remark of the chief justice is at variance with those before quoted from the case of *Kimmel v. Kimmel*, where the law is said to be accurately stated.

In *Gass v. Stinson*, 2 Sumn. 610, Mr. Justice Story says, "where the examination is to general credit, the course in England is to ask the question of the witnesses, whether they would believe the party sought to be discredited, upon his oath. With us the more usual course is to discredit the party by an inquiry, what his general reputation for truth is, whether it is good, or whether it is bad." In the case of *People v. Mather*, 4 Wend. 257 [21 Am. Dec. 122], the subject is discussed, and it is said, "the rule, which, everything considered, has been found safest on this subject, is to allow general evidence to be given of general character."

The true principle appears to be, to allow the character, which a witness has acquired for truth, to be proved as a fact in the case, from which, combined with all the various other matters in the testimony tending to establish or to impair it, the jury will form their own opinion respecting the credit due to his statements. The words of the interrogatory, by which such testimony is to be extracted, are not very material. Perhaps as short and useful a form as any, might be to inquire, whether he knows the general character of the witness? and if the answer be in the affirmative, what is his general reputation for truth? And on the cross-examination, the inquiry may extend to the witness'

opportunity for knowing the character of the other witness; for how long a time, and how generally the unfavorable reports had prevailed; and from what persons he has heard them. This will present the whole facts respecting the character for truth to the jury; and that is all that can be legitimate or useful. Everything else is much better suited to mislead, than to instruct them; and after this decision has been regularly published, will in our practice be excluded. It does not appear that the presiding judge did more in this case than make certain remarks respecting the proper course to be pursued in the introduction of testimony of this description; or that any proper testimony was excluded, or that the party was in any other way injured by them. And they do not, therefore, whether correct or not, afford sufficient reason for setting aside the verdict. The second proposition is not the subject of complaint.

In our pauper laws, there is a marked distinction between the place of residence, or home, and the place of legal settlement. The latter can not be changed without acquiring a new one. The former may be abandoned, without evidence that another residence has been secured. The third proposition relating to this subject is correct. And if, as the counsel assert, it was material to know whether a residence might be abandoned without evidence of a new one acquired, a specific instruction might have been obtained by a request. If the fourth proposition be objectionable, it is so, rather as an expression of an opinion on the state of the facts, which is not a matter of legal exception, than as an exhibition of the law arising out of them. It assumes, that it was clearly established by the proof, that the husband had no control over the members of his family when the supplies were furnished; and if he had no such control, the instruction was fully authorized by the case of *Green v. Buckfield*, 3 Greenl. 136. If the counsel thought that the assumption was unauthorized and injurious to the rights of the defendants, they might have requested instructions, that if the jury should find, that the supplies were furnished to those under his care and protection, he would not acquire a settlement in that town by the act of March 21, 1821.

Exceptions overruled.

IMPEACHING WITNESSES.—The credit of a witness can be impeached only by evidence of his general character: *Allen v. Young*, 17 Am. Dec. 130; *Evans v. Smith*, Id. 74, and note. The following decisions support the position that a witness may be asked what is the general reputation of the person sought to be impeached, and then whether he would believe that person under oath: *Blue v. Kibby*, 15 Id. 95, and note; *People v. Mather*, 21 Id. 122; *Chess v. Chess*, Id. 351.

FARRAR v. GILMAN.

[19 MAINE, 440.]

CASHIER'S INDORSEMENT OF NEGOTIABLE PAPER belonging to the bank is *prima facie* evidence of a legal transfer.

ACTION on a promissory note, the defendants consenting to be defaulted subject to the opinion of the court whether an indorsement of a note payable to the order of a bank, by the cashier, without any other proof of his authority, passed the property in the note.

Gilman, for the defendants

E. G. Rawson, *contra*.

By Court, WATSON, C. J. Negotiable notes of hand and bills of exchange are often negotiated to and from banks, and from one bank to another. Nothing is more common than paper of this kind, bearing the indorsement of the cashier of a bank, in his official capacity. And it may perhaps be assumed as a universal usage, that when instruments of this description are indorsed or transferred by a bank, he becomes their organ for this purpose. It may not be necessary to decide, that he may do this without special authority; and such an assumption might well be questionable. But as he is held out to the public as the confidential officer and actuary of the bank, as he is under bonds for the faithful performance of his duties, and as he acts as their organ in the transfer of negotiable paper, it is not in our opinion too much to hold, that when he indorses such paper, belonging to the bank, in his official capacity, it is *prima facie* evidence of a legal transfer. In *Folger v. Chase*, 18 Pick. 63, the authority of the cashier was proved by a vote of the directors. But Wilde, J., who delivered the opinion of the court, says: "We think the indorsement by the cashier, in his official capacity, sufficiently shows, that the indorsement was made in behalf of the bank." In the *United States v. Elijah D. Greene et al.*, 4 Mason, 427, a note, the property of the bank of Passamaquoddy, was indorsed by their cashier to the plaintiffs. His authority to do so, does not appear to have been proved, nor was it questioned.

Judgment for plaintiff.

See a parallel decision: *Everett v. Bank of United States*, 30 Am. Dec. 584. As to the duties of the president and cashier of a bank, see *Leggett v. N. J. M. & B. Co.*, 23 Id. 728.

EDDY v. BOND.

[19 MAINE, 461.]

BILL OR NOTE PAYABLE TO A PERSON NAMED, or bearer, is payable to bearer, and one coming into possession of it for a valuable consideration lawfully, is not required to show any consideration between the maker and the person named.

ALTERING A NOTE FROM "I PROMISE" TO "WE PROMISE," by a party to the note, before it is negotiated, is not a material alteration.

ADDING THE NAME OF AN ATTESTING WITNESS to a note, before its negotiation, is not a material alteration.

ALTERATION NOT APPARENT ON INSPECTION, and which was made before any one as holder or payee had any legal claim upon it, and while it was still in the hands of one of the promisors, must be presumed to have been made by their consent.

ASSUMPSIT on a promissory note, payable to Gilbert Knowlton or bearer. The facts of the case, so far as they are essential to an understanding of the decision, appear from the opinion. Verdict for the plaintiff.

J. A. Poor, for the defendants

A. G. Jewett, contra.

By Court, **SHEPLEY, J.** The presiding judge declined instructing the jury as requested, "that (the note) being payable to Gilbert Knowlton or bearer, unless some consideration passed between the payee and the makers, it could not be put in circulation by any other person and become binding on them." A bill or note payable to a person named, or bearer, is payable to the bearer; and one coming into possession of it for a valuable consideration, lawfully, is not required to show any consideration between the maker and the person named: *Bulard v. Bell*, 1 Mason, 252; *Ellis v. Wheeler*, 3 Pick. 18; *Pierce v. Crafts*, 12 Johns. 90. And a compliance with that request was properly refused.

The note as originally drawn and signed, was made to read, "I promise," and was altered to read, "We promise;" and the jury were correctly instructed, that the alteration was not material. As first drawn, the signers were jointly and severally bound: *Hemmenway v. Stone*, 7 Mass. 58 [5 Am. Dec. 27]. The alteration limited their liability to the holder; and did not change their legal rights in relation to each other. It was not made by the holder, but by a party to the note before it was negotiated. The attestation of a note by one, who was not present,

and did not see the maker sign, has been decided to be a material alteration: *Brackett v. Mounfort*, 2 Fairf. 115. The presiding judge, on this point, instructed the jury, "that the addition of the subscribing witness without the knowledge or consent of the promisors, if done fraudulently, would render the note void; but that if the name of such witness was added before the note went into the plaintiff's possession, the law would presume, that such alteration was made with the knowledge and consent of the defendants." Considering the testimony in the case, the use of the language, "before the note went into the plaintiff's possession," was equivalent to saying, before it was issued. And a note is not considered as issued before it comes to the hands of some one entitled to make a claim upon it: *Sherrington v. Jermyn*, 3 Car. & P. 374. In *Henman v. Dickinson*, 5 Bing. 183, it was decided, "that where an alteration appears on the face of a bill, the party producing it must show, that the alteration was made with consent of parties, or before the issuing of the bill." And in *Johnson v. The Duke of Marlborough*, 2 Stark. 313, where the date of the bill appeared on the face of it to have been altered by the acceptor, Abbott, J., said that "he could not presume one way or the other, and unless it could be proved, that the alteration was prior to the acceptance, the bill was void for want of a new stamp." It was then proved, that the bill was in the possession of Wooddison, the drawer, after the acceptance, and this was held to be *prima facie* proof, that it had not been previously negotiated. In the case of the *Cumberland Bank v. Hall*, 1 Halst. 215, it was held, that an alteration apparent on the face of a note was not to be presumed to have been made after its execution. It is not necessary to express any opinion on that question in this case. The cases of *Henman v. Dickinson*, and *Johnson v. The Duke of Marlborough*, are noticed only for the purpose of showing, that they proceed upon the principle, that where the alteration appears to have been made before the bill or note was issued, it is not presumed to be fraudulent, and does not destroy its validity. In the case of *Farmer v. Rand*, 14 Me. 225, and 16 Id. 453, the note had been negotiated, had passed out of the hands of the maker, and had been indorsed by the several parties before the alteration was made. And it was contended that after such proof, it was to be presumed that the alteration was made by consent, but it was decided otherwise. That was a case of an alteration not apparent by an inspection of the note. And so

is the one now under consideration, and the testimony shows, that it was made before the note was negotiated, although after it had been signed and offered for negotiation. An alteration not apparent on inspection, and which was made before any one as holder or payee had any legal claim upon it, and while it was in the hands of one of the promisors, must be presumed to have been made by their consent. The rule, that fraud or crime is not to be presumed, would apply in such a case.

Exceptions overruled.

WHAT IS A MATERIAL ALTERATION OF A NEGOTIABLE INSTRUMENT: See *Woodworth v. Bank of America*, 10 Am. Dec. 239, and the discussion in the note thereto: *Stephens v. Graham*, Id. 485; *Bank of Commonwealth v. McOord*, 29 Id. 398; *Letcher v. Bates*, 22 Id. 92; *Newell v. Mayberry*, 23 Id. 261; *Hall v. Bank of Commonwealth*, 30 Id. 685; *Aubuchon v. McKnight*, 13 Id. 502.

FISH v. JACKMAN.

[19 MAINE, 467.]

AGENT TO MAKE DEMAND ON A PROMISSORY NOTE is not entitled to a day before he is bound to give notice; but he may wait until the next mail. NOTICE OF NON-PAYMENT SHOULD BE SENT TO THE POST-OFFICE NEAREST to the party sought to be charged, except in remote country places; in such case notification by special messenger should be made.

IN SUCH CASE, if a messenger is sent off the morning after receiving notice from holder's agent that payment had been refused, it will be a case of due diligence.

ASSUMPSIT against the indorser of a promissory note. Fish employed Baker to make demand upon the maker. He did so on the twenty-seventh of March, 1839. Payment was refused. By the next mail Baker notified Fish of the refusal. The letter did not reach Fish until the evening of the first of April, and on the following morning he sent a messenger with notice of non-payment to defendant, who lived some forty-eight miles away, and in a secluded spot twenty miles from the post-office. The messenger reached the defendant on the fourth. The defendant contended that there was no legal notice of non-payment. Verdict for plaintiff.

A. G. Jewett, for the defendant.

Hodgdon, contra.

By Court, WESTON, C. J. The plaintiff is not an agent, but the indorser and holder of the note. H. K. Baker, who was

employed by him through Mr. Wells, to demand payment of the maker, was constituted the agent of the plaintiff to make such demand. According to the cases cited for the defendant, an agent is not entitled to a day before he is bound to give notice. The case finds, that in point of fact, he did, by the next mail after the demand, send notice to the plaintiff. Although not entitled to a day, he was not obliged either to go himself or to employ a special messenger. He might avail himself of the post-office, and, as he sent by the next mail, he made use of all possible diligence by this mode of conveyance: *Shed v. Brett*, 1 Pick. 401 [11 Am. Dec. 209].

It is contended that the agent should have sent his notice directly to the defendant. The maker living at a distance from the plaintiff, it was competent for him to send the note to an agent for the purpose of making a demand. This being done, notice to him of the result by the next mail was, in our judgment, due diligence. It does not appear that the agent knew where the defendant resided; and if he did, we are quite clear that a notice sent by the agent to the defendant by mail would have been insufficient. In the leading case of *Ireland et al. v. Kip*, 11 Johns. 231, it was laid down, that if the party to be served by a notice, resides in a different place or city, then the notice may be sent through the post-office to the post-office nearest the party entitled to notice. To this rule there must necessarily be exceptions. It could not apply to the case of the defendant, who lived secluded in a part of the country, but just beginning to be reclaimed from the wilderness, twenty miles from any post-office. As the plaintiff was not at liberty, under the circumstances, to avail himself of the mail, and as it does not appear that there was any other ordinary mode of conveyance to the defendant's residence, no other alternative remained but to notify him in person, or to send a special messenger. The plaintiff received his notice the afternoon or evening of the first of April. The judge instructed the jury, that it would be seasonable if he commenced exertions to give notice the next day. And in our opinion, this would be due diligence on his part. The jury have found this fact. It is said, this is against the evidence, as his letter of notice is dated at Lincoln, his own residence, on the third of April. The jury might have deduced from the distance and from the state of the traveling, upon which all the evidence is not reported, that the letter may have been misdated. These facts must be taken into the ac-

count on the question of due diligence; and they were proper for the consideration of the jury. We perceive nothing in the ruling of the presiding judge which calls for correction; and we are not satisfied that the verdict is against evidence.

Judgment on the verdict.

AGENT TO MAKE DEMAND MUST GIVE NOTICE of non-payment to his principal, who must then notify the indorser: *Tunno v. Lague*, 1 Am. Dec. 141.

SUFFICIENCY OF NOTICE.—Mailing notice to post-office nearest indorser's residence is sufficient: *Whitwell v. Johnson*, 9 Am. Dec. 165; *Shedd v. Brett*, 11 Id. 209, and note; *Bank of Columbia v. McGruder*, 14 Id. 271. Or where it is sent to post-office where indorser usually goes for letters: *Reid v. Payne*, 8 Id. 311; *Bank of United States v. Lane*, 14 Id. 595. Notice by letter to person in same town is insufficient: *Miranda v. City Bank*, 26 Id. 493.

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ADVERSE POSSESSION.

1. GRANTOR'S ENTRY AFTER CONVEYANCE MUST BE DEEMED ADVERSE TO THE GRANTEE where there is no evidence that he entered for or under him, but where he acted in all respects as the sole owner and claimant, making leases, receiving rents, paying taxes, improving the property, etc., and uninterrupted enjoyment for twenty-one years will give him a complete title. *Watson v. Gregg*, 176.
2. TITLE OR COLOR OF TITLE IS UNNECESSARY to constitute an adverse possession under the statute of limitations. *Id.*
3. ENTRY AND POSSESSION BY ONE OF SEVERAL HEIRS of a person dying in adverse possession of land inure to the benefit of himself and all the co-heirs, and the adverse possession is thereby continued for the purpose of gaining title. *Id.*
4. TITLE BY PRESCRIPTION CAN NOT BE ACQUIRED by possession unaccompanied by any claim of ownership. *Waser v. Pratt*, 681.
5. POSSESSION FOLLOWS THE TITLE where several are in the contemporaneous use and occupation of property. *Id.*
6. INCLOSURE AND CULTIVATION ARE NECESSARY TO CONSTITUTE ADVERSE POSSESSION of a tract by one having no color of title, so as to protect him from an action of trover by the real owner for timber cut thereon. *Wright v. Guier*, 108.

7. REPEATED TRESPASSES BY CUTTING TIMBER ON UNOCCUPIED WOOD LAND, by the owner and occupant of an adjoining tract, do not constitute such adverse possession as to defeat an action of trover for such timber by the real owner; and a purchaser of the land on execution against such trespasser, who continues to trespass thereon in the same way, is equally liable. *Id.*
 8. POSSESSION OF ONE HAVING A RIGHT OF POSSESSION UNDER ONE TITLE, but claiming under another, the latter being adverse, the former not, is deemed to be a possession under the title which is not adverse. *Nichols v. Reynolds*, 238.
 9. ACTUAL POSSESSION OF ONE PRIVY is constructively the possession of each, according to his title, although the party in possession claims to be in by an adverse title. *Id.*
 10. POSSESSION FOR TWENTY-ONE YEARS BY A FENCE AS THE LINE, or by a house or stable, by a party claiming the land as his own, conclusively establishes his right, whether he knows of an adverse claim by the adjoining owner or not. *Brown v. McKinney*, 139.
- See CO-TENANCY, 1, 2, 4-6; EJECTMENT, 2; TRUSTS, 2.

AGENCY.

1. WHERE AGENT SELLS HIS PRINCIPAL'S GOODS AND TAKES PROMISSORY NOTE therefor, payable to himself, the principal may, before payment, forbid it to be made to the agent, and a payment to him after this will not be good. *Pitts v. Mower*, 727.
 2. PRINCIPAL MAY SUE IN HIS OWN NAME on a contract of sale made by his agent, unless such contract has been extinguished, as it may be with us, by taking a negotiable promise. *Id.*
 3. VENDOR OF MERCHANDISE PURCHASED BY A SUBAGENT of another from whom the merchandise was ordered, can not charge the person in whose interest the purchase was made, although the sale was made with the knowledge that the goods were destined for the use of such person, where it appears that credit was given directly to the individual from whom the goods were primarily ordered, and not to the one for whose use they were intended, and that until after the insolvency of the former, no attempt to hold the latter responsible was made. *New Castle Mfg. Co. v. Red River R. R. Co.*, 686.
 4. FOREIGN AGENT OR FACTOR IS PERSONALLY LIABLE on contracts made by him in the interest of the person by whom he is employed. *Id.*
 5. AGENT NEED NOT DESCRIBE HIMSELF AS SUCH in the contract in such case, but in the absence of evidence showing that credit was given to the principal, it will be presumed to have been given to the agent exclusively. *Id.*
 6. AGENT OR TRUSTEE CAN NOT PURCHASE AT SALE MADE BY HIM for the benefit of his principal or *cestui que trust*, without the consent of the latter. *Robertson v. Western M. & F. Ins. Co.*, 673.
- See COMMON CARRIERS; EJECTMENT, 1; EMBODIMENTS, 15; NEGOTIABLE INSTRUMENTS, 17.

ALIENS.

1. ALIENS ARE NOT EXCLUDED FROM INHERITING property of any description by the laws of Louisiana. *Dubé v. Richmond v. Milne's Ex'rs*, 613.

2. INCAPACITY OF ALIENS UNDER THE LAWS OF ENGLAND AND SCOTLAND extends to the acquisition of lands or heritable property by purchase or succession, but an alien may, in those countries, acquire property in, or make a will of, personal estate, and sue for personal debts. *Id.*
3. DONATIONS INTER VIVOS AND CAUSA MORTIS may, under the laws of Louisiana, be made in favor of an alien when the laws of the country of which he is a citizen do not prohibit similar dispositions from being made there in favor of citizens of Louisiana. *Id.*

See WILLS, 3, 4.

ALIMONY.

See MARRIAGE AND DIVORCE, 2.

ALLUVION.

See WATERCOURSES, 1-7.

ALTERATION OF INSTRUMENTS.

1. ALTERING A NOTE FROM "I PROMISE" TO "WE PROMISE," by a party to the note, before it is negotiated, is not a material alteration. *Biddy v. Bond*, 767.
2. ADDING THE NAME OF AN ATTESTING WITNESS to a note, before its negotiation, is not a material alteration. *Id.*
3. ALTERATION NOT APPARENT ON INSPECTION, and which was made before any one as holder or payee had any legal claim upon it, and while it was still in the hands of one of the promisors, must be presumed to have been made by their consent. *Id.*
4. ALTERATION OF A DEED, WHEN DOUBTFUL, will not warrant its exclusion from evidence. *Davis v. Fuller*, 334.

AMENDMENTS.

1. AMENDMENTS INTRODUCING NEW CAUSE OF ACTION are not permitted in our practice. And although the allowance of amendments, in cases where they are allowable by law, rests in the discretion of the judge of the district court, and will not be revised by this court, yet if the judge allow an amendment which the law does not authorize, the party affected has a right to except. *Newall v. Hussey*, 717.
2. PLAINTIFF WILL NOT BE ALLOWED TO AMEND HIS DECLARATION after the defendant has been defaulted and the cause has been argued upon the existing counts. *Palmer v. York Bank*, 710.
3. AMENDMENT WILL BE ALLOWED in a suit upon an invalid promissory note, given in settlement of an account, by incorporating a count upon the original indebtedness. *Perrin v. Keene*, 759.
4. NO AMENDMENT OF PLEADINGS IS ALLOWED after the rendition of judgment. *Landry v. Baugnon*, 606.

ANNUITIES.

1. PROMISE TO PAY ANNUITY, IN CONSIDERATION OF FORBEARANCE to sue the executors of the grantor thereof, binds the promisor, if the grantor was personally bound for its payment. *Horton v. Cook*, 151.

2. GRANTOR OF ANNUITY IN TERMS IS, PRIMA FACIE, PERSONALLY BOUND for its payment, from whatever fund payable, and the covenant to pay implied from such grant, can be rebutted only by a plain intent on the face of the instrument that the annuitant is to resort only to the specific fund. *Id.*
3. ANNUITY TO ONE AS PURCHASER AND NOT AS BENEFICIARY should be construed as favorably towards the annuitant as the words will bear. *Id.*

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See PLEADING AND PRACTICE, 24.

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ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. DEBTOR MAY GIVE PREFERENCES AMONG HIS CREDITORS; but if, in the deed of assignment, he reserves any advantage to himself, such reservation vitiates the deed, and the advance of additional consideration at the time of the conveyance will not change such result. *Anderson v. Fuller*, 290.
2. LEAVING A DEBTOR IN POSSESSION OF HIS PROPERTY is such a benefit as vitiates an assignment made by him, for the benefit of his creditors. *Id.*

ASSIGNMENT OF CONTRACT.

ASSIGNMENT OF A CHOSE IN ACTION IS OF NO EFFECT as against subsequent purchasers, without notice, from the assignor, or against his attaching creditors, unless within a reasonable time after the assignment notice thereof is given to the debtor. *Vanbuskirk v. Hartford Fire Ins. Co.*, 473.

ATTACHMENTS.

1. DEBT ON WHICH SUIT HAS BEEN INSTITUTED MAY BE ATTACHED in a proceeding prosecuted in the same court. *Hitt v. Lacey*, 440.
2. TO CONSTITUTE ATTACHMENT, OFFICER NEED NOT ACTUALLY HANDLE the goods attached; but he must be in view of them, with the power of controlling them, and of taking them into possession. *Nichols v. Patten*, 713.
3. RETURN OF OFFICER, WHERE HE IS A PARTY, is merely *prima facie* evidence of an attachment. *Id.*
4. TO PRESERVE ATTACHMENT, OFFICER MUST RETAIN HIS CONTROL and power of taking immediate possession. If he fails to do this, the attachment will be regarded as abandoned. *Id.*
5. MERE REQUEST MADE BY OFFICER TO A PERSON TO GIVE NOTICE that property has been attached, is not sufficient to show that he acted for the officer, unless he consented to assume the trust of taking charge of the property for him. *Id.*
6. PROPERTY UNDER ATTACHMENT MAY BE CONVEYED BY THE DEBTOR, subject to the attachment. And any merely formal act of delivery which does not interfere with any right of the officer in relation to the property, will not subject the purchaser to an action by the officer. *Id.*
7. ANY ACT WHICH DEPRIVES OFFICER OF CONTROL OF ATTACHED PROPERTY will subject the person who does it to an action for such property. *Id.*

6. RETENTION OF THE POSSESSION OF PERSONAL PROPERTY SEIZED by a sheriff or his deputy is necessary to preserve the lien of the attachment. *Gower v. Stevens*, 737.
9. SHERIFF CAN NOT CONSTITUTE THE DEBTOR HIS AGENT to keep the property attached. *Id.*
10. ATTACHMENT DISSOLVED BY REASON OF THE POSSESSION of the property seized remaining with the debtor can not be revived by notice. *Id.*
11. TO DETERMINE WHETHER ONE IS A TRUSTEE or not under the law of foreign attachment, a usual but not necessarily decisive test is, whether the principal has or has not a right of action against the supposed trustee. *Whitney v. Munroe*, 732.
12. INTEREST OF A JOINT CONTRACTOR, IN THE HANDS OF A TRUSTEE, may be reached by foreign attachment, although the effect will be to sever the liability. *Id.*
13. PRIORITY BETWEEN THE RIGHTS OF JOINT AND INDIVIDUAL CREDITORS will not be inquired into, in a suit by the latter against the debtor's trustee. *Id.*
14. RULE REQUIRING TRANSFER OF POSSESSION and actual removal of personal property in order to render a sale or attachment valid as against creditors, is a rule of policy, and not of evidence; and therefore proof of the honesty of the transaction will not be sufficient to remove the legal effect of a failure to remove property attached. *Mills v. Camp*, 488.
15. FAILURE TO REMOVE PERSONAL PROPERTY ATTACHED IS EXCUSED where the removal of the property can not be effected without great injury or expense, or where the removal would cause material damage. *Id.*
16. CONTINUED POSSESSION IS NECESSARY to the validity of an attachment. *Id.*
17. CONTINUAL PRESENCE OF THE ATTACHING OFFICER at the place where the property attached lies is not necessary. There will be a constructive possession sufficient to maintain the attachment lien, if the officer do not suffer the debtor to regain actual possession or to exercise any acts of ownership over the property. *Id.*
18. FOREIGN ATTACHMENT.—GOODS CONTAINED IN BOXES SECURELY FASTENED, so that their character is entirely concealed, when deposited with a third person are not liable to attachment by ordinary process, but may be reached by process against the depository as trustee. *Hooper v. Day*, 734.
19. SHERIFF'S REMOVAL FROM OFFICE DOES NOT ABATE HIS RIGHT to retain possession of property previously attached by him, to await judgment and execution, nor will it exonerate him from neglecting to deliver it up to be taken under execution, after demand made for it within thirty days after final judgment. *Tubey v. Smith*, 704.
See ASSIGNMENT OF CONTRACT; CO-TENANCY, 11; GARNISHMENT.

AUDITA QUERELA.

AUDITA QUERELA IS A JUDICIAL WRIT directed to the court having the record, for the purpose of setting aside a judgment or execution, and must be between the parties to the former proceeding sought to be attacked. *Gleason v. Peck*, 329.

AWARDS.

1. AWARD NOT IN WRITING MAY BE GOOD UNLESS IT INVOLVES TITLE to real estate, but if it does involve such title it is void. *Philbrick v. Preble*, 718.
2. WHEN PART OF AWARD IS GOOD AND PART IS VOID, the whole will be treated as void, if the void part and the good part are so connected that justice might not be done by permitting the latter to have effect. *Id.*

BAILMENTS.

1. IF A PAWN IS LOST THE PLEDGER CAN NOT RECOVER ON THE DEBT for which it stood as security, without showing that the loss was in no wise attributable to any want of necessary care and diligence upon his part. *Orecher v. Monroe*, 660.
2. HIRER OF PERSONAL PROPERTY CAN NOT BY A SALE thereof, though to a purchaser in good faith, pass the title. *Russell v. Foster*, 632.

See NEGOTIABLE INSTRUMENTS, 4-6.

BANKS AND BANKING.

1. SAVINGS BANK THAT UNDERTAKES TO INVEST ALL MONIES DEPOSITED with it, and repay them upon demand made in conformity with its by-laws, is liable to an action of assumpsit upon failure so to do. *Makin v. Institution for Savings*, 740.
2. BANK IS NOT LIABLE FOR NEGLIGENCE OF A NOTARY employed by it to protest a promissory note. *Hyde v. Planters' Bank*, 621.
3. CASHIER'S INDORSEMENT OF NEGOTIABLE PAPER belonging to the bank is *prima facie* evidence of a legal transfer. *Furrer v. Gilman*, 768.

See CORPORATIONS, 19, 22; PLEADING AND PRACTICE, 2.

BEYOND SEAS.

See STATUTE OF LIMITATIONS, 5.

BONA FIDE PURCHASERS.

NOTE GIVEN FOR PURCHASE PRICE OF LAND, TITLE TO WHICH FAILS, is valid in the hands of *bona fide* purchasers, but they can recover only the amount they paid for the note from the maker. *Petty v. Hennessy*, 306.

See FRAUDULENT CONVEYANCES, 4.

BONDS.

See BOTTOMRY; PLEADING AND PRACTICE, 7, 8; SEAL.

BOOK OF ENTRY.

See EVIDENCE, 11, 12.

BOTTOMRY.

1. VALID BOTTOMRY BONDS MAY BE EXECUTED BY THE OWNER of a vessel at the home port, if the money obtained thereon is given on maritime risks, and at the hazard of the lender, although not applied to the purposes of the ship or of the voyage. *Greeley v. Waterhouse*, 730.
2. REQUITED CONSIDERATION OF A BOTTOMRY BOND may be inquired into, and contradicted by the creditors of the owner of the vessel. *Id.*

BOUNDARIES.

See DEEDS, 1, 2, 3

CASHIER.

See BANKS AND BANKING, 3; CORPORATIONS, 22.

CERTIORARI.

CERTIORARI BEING A SUBSTITUTE FOR WRIT OF ERROR in those cases in which a writ of error does not lie, is governed by the same rules. Therefore no point can be raised, on certiorari in a road case, which is not apparent exclusively in the proceedings. *Case of Philadelphia etc. R. R. Co.*, 202.

CHALLENGE.

See JURY AND JURORS, 1-3, 6.

CO-HEIR.

See CO-TENANCY, 3, 5, 6, 7.

COLOR OF TITLE.

See ADVERSE POSSESSION.

COMMON CARRIERS.

PRIVITY OF CONTRACT EXISTS BETWEEN MERCHANT AND HIS CARRIER, the latter being to some extent the former's agent. *Simpson v. Hand*, 231.

See NEGLIGENCE, 4, 6.

COMPARISON OF HANDWRITING.

See EVIDENCE, 6, 7, 8.

CONFESSIONS.

See EVIDENCE, 15.

CONFLICT OF LAWS.

1. LAW LOCUS CONTRACTUS DETERMINES AS TO VALIDITY OF CONTRACTS. *Buckner v. Watt*, 671.
2. NO STATE IS BOUND TO RECOGNIZE AND ENFORCE CONTRACTS INJURIOUS to its own interests or those of its subjects, although valid by the law of the place where made. *Id.*
3. STATUTE OF LOUISIANA IN DEROGATION OF THE RULES OF EVIDENCE as established elsewhere, will nevertheless, as to contracts entered into in another state, be obeyed and executed in any action brought to enforce such contracts in this state. *Id.*
4. MARRIAGE VALID BY THE LAW OF THE PLACE WHERE CELEBRATED is valid everywhere, and if invalid there is invalid everywhere; but to the latter part of this rule there are exceptions, as in certain cases where marriages between citizens of one country, while in another, may be celebrated according to the laws of their own country. *Phillips v. Gregg*, 158.
5. PENAL STATUTES OF ONE STATE ARE NOT IN FORCE beyond the limits of the state which enacted them. *Suffolk Bank v. Kidder*, 354.

6. **CONTRACTS ARE CONSTRUED IN ACCORDANCE WITH THE *LEX LOCI***, but the remedy thereon is governed by the *lex fori*. *Id.*
7. **STATUTE OF MASSACHUSETTS**, providing that in a suit on a usurious contract, recovery must be limited to the original demand, less three times the amount of the usurious reserve, applies to the remedy only, and has no force in Vermont. *Id.*
8. **LAW OF THE PLACE WHERE A CONTRACT IS TO BE PERFORMED** governs in determining the rights of the parties to a contract entered into in one country to be performed in another. *Harrison v. Edwards*, 364.
9. ***LEX FORI* GOVERNS IN DETERMINING THE MODE OF TRIAL**, including the form of pleading, the quality and degree of evidence, and the mode of redress. *Id.*

CONSIDERATION.

See **ANNUITIES**, 1; **BONA FIDE PURCHASERS**; **NEGOTIABLE INSTRUMENTS**, 11; **PUBLIC LANDS**, 6.

CONSTITUTIONAL LAW.

1. **STATUTES SHOULD BE MANIFESTLY UNCONSTITUTIONAL** to warrant the court in declaring it void. *City of Louisville v. Hyatt*, 594; *Lane v. Dorman*, 543.
2. **LEGISLATURE CAN NOT EXERCISE JUDICIAL POWERS**. *Lane v. Dorman*, 543.
3. **SPECIAL ACT PROVIDING FOR SALE OF DECEDENT'S LAND**, without notice to the heirs, and for the application of the proceeds to the claims of the administrator and another person against the estate, for moneys advanced and liabilities incurred by them on its account, and requiring the administrator to make deeds to the purchasers of the land, and to give bond to the heirs for the application of the proceeds as provided by the act, is unconstitutional, because it is an exercise of judicial power, and also because the heirs are thereby dispossessed of their freehold, not by the judgment of their peers, nor by the law of the land. *Id.*
4. **CHARTER AUTHORIZING MAJORITY OF LOT OWNERS ON A SQUARE** to require the grading and improvement of streets bounding their square, at the expense of lot owners on such square, by petition to the city council, provided the council unanimously direct such improvement to be made, is constitutional. *City of Louisville v. Hyatt*, 594.
5. **LEGISLATURE MAY REGULATE THE MODE AND MANNER OF ENJOYING PROPERTY** and regulate callings, where the public interests are affected, by general laws operating alike on all citizens. *Mayor etc. of Mobile v. Yule*, 441.
6. **PENNSYLVANIA ACT AUTHORIZING APPROPRIATION OF ANOTHER'S LAND FOR LATERAL RAILROAD** to connect a private coal mine with a public river or other highway is constitutional, and the act does not require the petitioner to own the land at the point of junction. *Harvey v. Thomas*, 141.
7. **ACT OF 1839, FOR RELIEF OF SURETIES ON POOR DEBTORS' BONDS**, is constitutional. *Oriental Bank v. Freeze*, 701.

See **CORPORATIONS**, 13, 14; **EMINENT DOMAIN**; **STATUTES**.

CONTINUANCE.

1. **APPEARANCE OF DEFENDANT, UNDER PROTEST**, at a time to which an adjournment of a cause had been improperly had, can not have the effect of

reviving process which had failed from the non-appearance of the plaintiff at the time named in the writ. *Martin v. Fales*, 693.

2. CONTINUANCE OF A TRIAL by a justice of the peace, made in the absence of the parties, is not binding. *Stevens v. Beach*, 359.

CONTRACTS.

SUBSCRIPTION OF MONEY TO INDUCE RAILWAY COMPANY TO LOCATE BRIDGE at a particular point constitutes a valid contract. *Cumberland Valley R. Co. v. Baab*, 132.

See CONFLICT OF LAWS, 1, 2, 6-8; ILLEGAL CONTRACTS; QUANTUM MERUIT; RESCISSION OF CONTRACTS.

CONTRIBUTION.

JOINT JUDGMENT DEBTOR PAYING WHOLE DEBT under an express agreement with the creditor that such payment is not to be deemed a satisfaction of the judgment, but that such debtor shall have the right to enforce the same against his co-debtors, is entitled to be subrogated to the creditor's rights for the purpose of obtaining contribution from such co-debtors, and where such debtor has procured execution to be issued upon the judgment, which the creditor moves to quash, the court will, upon proof of the facts, overrule such motion. *Morris v. Evans*, 591.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, 1-6.

COPARCENERS.

See CO-TENANCY, 1, 12.

CORPORATIONS.

1. BOROUGH OF BARONY IS A CORPORATION, under the laws of Scotland, constituted by sovereign authority, composed of the inhabitants of a particular district, organized under royal charter, making a grant of the lands included therein to a subject, and annexing to it the right to exercise within the territory a particular authority or jurisdiction. *Duke of Richmond v. Milne's Ex'rs*, 613.
2. SUCH CORPORATION MAY RECEIVE GIFTS INTER VIVOS OR CAUSA MORTE, through the intervention of trustees. *Id.*
3. CORPORATION IS SUFFICIENTLY ORGANIZED TO BIND SUBSCRIPTION to the capital stock, when the parties mentioned in the charter have, in pursuance of its terms, by written articles of association, organized themselves, and opened books of subscription. *Milford etc. Co. v. Brush*, 78.
4. SUBSCRIPTION IS NOT VOID FROM MISTAKE IN CORPORATE NAME, and the contract will operate in favor of those for whose benefit it was intended. *Id.*
5. AMENDMENT OF ACT OF INCORPORATION WILL NOT EXONERATE PREVIOUS SUBSCRIBERS from their subscription, when the change produced by the amendatory act is but trifling. *Id.*
6. LEGISLATURE MAY WAIVE FORFEITURE OF CORPORATE RIGHTS, and an act extending the time of the commencement of certain work amounts to a waiver of the forfeiture incurred by the corporation's failing to com-

- mence the work within the time prescribed by the act of incorporation; and the liability of stockholders is not affected by the extension. *Id.*
7. GRANT OF PRIVILEGE TO CORPORATION IS NOT EXCLUSIVE, unless expressly said to be so by the charter; consequently the grant of a privilege to one company does not prevent the legislature from granting a like privilege to another, though the business of the former is injured or even ruined thereby. *Tuckahoe Canal Co. v. Tuckahoe R. R. Co.*, 374.
 8. ORDINANCE OF CITY COUNCIL ALLEGED TO HAVE BEEN "DULY MADE," where such allegation is not denied, will be presumed to have been passed by a unanimous vote as required by the city charter. *City of Louisville v. Hyatt*, 594.
 9. ORDINANCE OF CITY COUNCIL MAY BE IMPEACHED by showing that it was not passed in the manner required by the charter, and the corporation books are not conclusive on that point. *Id.*
 10. COST OF GRADING STREET SHOULD BE DISTRIBUTED among the lot owners on a square, by imposing upon each his aliquot portion of the whole cost, estimated according to the extent of his lot on the street. *Id.*
 11. MUNICIPAL COUNCIL ARE FINAL JUDGES OF UTILITY of street improvements which they are authorized to make, and the remedy of a lot owner, if any, is by action, and not by resisting the order for the improvement. *Id.*
 12. ORDINANCE OF A MUNICIPAL CORPORATION IS NOT VOID as in restraint of trade, if it but relate to the regulation of the trade, and the regulation is for the good of the inhabitants of the city, or for the advantage of the trade and improvement of the commodity sold. *Mayor etc. of Mobile v. Yewille*, 441.
 13. *IDEM.*—THE LEGISLATURE MAY CONSTITUTIONALLY CONFER UPON A MUNICIPAL CORPORATION the power of regulating the assize of bread. *Id.*
 14. LEGISLATURE MAY CONFER UPON A MUNICIPAL CORPORATION the power to pass any by-law or ordinance which is not unreasonable or opposed to the general law of the state. *Id.*
 15. POWER TO PASS A BY-LAW CARRIES AS AN INCIDENT the power to enforce its observance by some reasonable penalty; what is a reasonable penalty is to be determined by a consideration of the offense prohibited. *Id.*
 16. PRECUNARY PENALTY FOR THE VIOLATION OF A MUNICIPAL ORDINANCE must be for a sum certain; it will not remove the objection that the ordinance fixes a sum beyond which the fine can not extend. *Id.*
 17. WHEN THE TRANSFER OF STOCK IS REQUIRED, by ordinance of the corporation, to be entered upon a transfer book, the transferees of the stock will not become stockholders prior to the entry on the transfer book. *State v. Harris*, 480.
 18. MUNICIPAL CORPORATION IS NOT LIABLE FOR GRADING STREET which is not level, under a charter authorizing it to improve the streets, although the complainant's property is injured thereby, there being no allegation of malice or wanton disregard of private right. *Green v. Borough of Reading*, 127.
 19. INFORMATION GIVEN TO BOARD OF DIRECTORS OF BANK, at a regular meeting, by one of their number, of the dissolution of a firm whose paper is subsequently offered for discount, is notice to the bank notwithstanding the absence at such meeting of the committee whose business it was to act on such matters. *Bank of Pittsburgh v. Whitehead*, 186

20. CORPORATION'S RIGHT TO ENJOY PROPERTY LASTS only so long as the corporation exists. *Fos v. Horak*, 48.
 21. UPON THE DISSOLUTION OF A CORPORATION BY LAPSE OF TIME, at common law its real estate reverted to its grantors and their heirs, its personal property escheated to the state, and its debts and credits became extinct. *Id.*
 22. PROMISSORY NOTE, EXECUTED IN FAVOR OF A BANK'S CASHIER, in trust for the use and benefit of the bank, is extinguished by the termination of the bank's corporate existence by lapse of time. *Id.*
 23. STOCKHOLDER OF A CORPORATION, THOUGH INCOMPETENT AS A WITNESS in its own behalf, may be called and examined by the opposite party in a suit against the corporation. *Hart v. New Orleans etc. R. R. Co.*, 689.
 24. STOCKHOLDER WHO IS CALLED AND EXAMINED as a witness on behalf of the plaintiff in a suit against the corporation, may be cross-examined and testify in favor as well as against his interests upon the matters in reference to which he is called. *Id.*
 25. CORPORATION IS LIABLE FOR DAMAGES for consequential injury arising from an act done in the exercise of its ordinary powers. *Rhodes v. City of Cleveland*, 82.
 26. GENERAL ISSUE IN AN ACTION BROUGHT BY A CORPORATION admits the capacity of the plaintiff to sue. *Phenix Bank v. Curtis*, 492.
 27. GENERAL ISSUE TO AN ACTION BY A CORPORATION does not admit the capacity of the corporation to make the contract upon which it sues; and therefore unless the charter of the corporation is one of which the court will take judicial notice, it must be exhibited to show the powers of the corporation. *Id.*
- See CONSTITUTIONAL LAW, 4; EMINENT DOMAIN, 1-5, 9; EVIDENCE, 16; QUO WARRANTO.

COSTS.

COSTS, WHEN THERE IS A PLEA PUIS DARREIN CONTINUANCE, which sets forth a true and valid defense, are to be adjudged to plaintiff to the time of plea pleaded. *Hitt v. Lacey*, 440.

CO-TENANCY.

1. ENTRY BY ONE CO-TENANT OR COPARCENER inures to the benefit of all, and can not become adverse without some unequivocal act amounting to an actual disseisin or ouster of the other co-tenants. *Hart v. Gregg*, 166.
2. PERCEPTION OF RENTS AND PROFITS BY ONE CO-TENANT, and erecting fences and buildings adapted for the cultivation of the common land, do not amount to a disseisin of the other co-tenants: so, it seems, even though the receipt of the rents and profits is accompanied by a claim of title to the whole land. *Id.*
3. TAKING OUT PATENT TO LAND BY ONE CO-HEIR expressly in trust for himself and the others is evidence of an intention to hold for all. *Id.*
4. POSSESSION BY TENANT IN COMMON IS NOT ADVERSE TO CO-TENANTS, so as to found a title by the statute of limitations, unless accompanied by circumstances unequivocally showing an adverse intent, such as a refusal, upon demand, to pay over the co-tenant's share of the rent. *Phillips v. Gregg*, 158.

5. HEIR CAN NOT OUST HIS CO-HEIRS, so as to gain title to himself, in land descending to them, upon which he has entered, without some clear, positive, and unequivocal act amounting to an open denial of their right. *Watson v. Gregg*, 176.
6. PERCEPTION OF RENTS AND PROFITS BY ONE CO-HEIR in possession of land of the ancestor is not sufficient to raise a presumption of an ouster of the other heirs. *Id.*
7. ADMISSIONS AS TO OUTSTANDING TITLE BY ONE CO-HEIR in possession of land held adversely by the ancestor at his death do not affect the rights of the other heirs, where there is no yielding of possession, or attornment to, or communication with, the holder of such outstanding title. *Id.*
8. TENANT IN COMMON CAN NOT MAINTAIN TROVER OR TRESPASS against his co-tenant in reference to personal property, unless there has been a destruction of the chattel. *Welch v. Clark*, 368.
9. SALE OF AN ENTIRE CHATTEL, HELD IN COMMON by one of two co-tenants, without the consent of the other, is not equivalent to a destruction. *Id.*
10. TENANT IN COMMON IS NOT DIVESTED OF ANY RIGHT by a sale by his co-tenant, but becomes a tenant in common with the purchaser. *Id.*
11. ATTACHMENT OF A CHATTEL, HELD IN COMMON, on a process against a co-tenant, is not such a destruction of the property as to give the other tenant a right to an action of trespass or trover against the attaching creditor or the sheriff. *Id.*
12. TENANTS IN COMMON TAKING BY DESCENT are regarded as coparceners under the Pennsylvania act of 1794. *Patterson v. Lanning*, 154.
13. JOINT TENANCY HAS NO EXISTENCE IN OHIO, as distinguished from tenancy in common. *Miles v. Fisher*, 61.
14. CO-TENANT, IN THE EXCLUSIVE POSSESSION OF LAND, is liable for the rent of so much of the premises as was capable of producing rent at the time he took possession, but not for what was rendered capable by his labor. *Hancock v. Day*, 293.
15. CO-TENANT IS LIABLE FOR WASTE committed by him on the common property. *Id.*
16. CO-TENANT IS NOT ENTITLED TO COMPENSATION for improvements made by him on the common property. *Id.*

See ADVERSE POSSESSION, 3; JUDGMENTS, 4; PARTITION.

COUNTERFEIT BILLS.

1. PARTY PAYING DEBT WITH COUNTERFEIT BILL is liable immediately, upon an implied promise or warranty that it was genuine, whether he knew it to be counterfeit or not, and a return of the bill before bringing the action is unnecessary. *Watson v. Cresap*, 572.
2. MONEY PAID FOR COUNTERFEIT BILL MAY BE RECOVERED in an action for money had and received, and the bill being worthless, a return of it need not be tendered, it seems, before suing. *Id.*
3. TESTIMONY THAT BILL IS COUNTERFEIT, FROM MERCHANTS who have been in the habit of receiving and paying away genuine bills on the same bank, is competent. *Id.*

COURTS.

See JUSTICES OF THE PEACE.

COVENANTS.

1. COVENANT AGAINST INCUMBRANCES IS A REAL COVENANT running with the land. *Foot v. Burnet*, 90.
2. MEASURE OF DAMAGES FOR BREACH OF COVENANT AGAINST INCUMBRANCES is the amount paid to remove the incumbrances, with interest, provided the same does not exceed the purchase money and interest; but in no case can the damages exceed the latter sum. *Id.*
3. IMPOSSIBILITY OF A GRANTEE'S OBTAINING POSSESSION of the land conveyed, will support an action for breach of the covenant of warranty, without proving a technical eviction. *Park v. Bates*, 347.
4. MEASURE OF DAMAGES IN AN ACTION FOR BREACH OF THE COVENANT OF WARRANTY is the value of the land at the time of eviction, without regard to the consideration expressed in the deed. *Id.*

CREDITORS' BILLS.

1. CREDITORS MUST ESTABLISH THEIR DEBT AT LAW before they can claim equitable relief. *Brown v. Long*, 43.
2. JUDGMENT CREDITORS MUST EXHAUST THEIR LEGAL REMEDIES by execution before they can obtain the interposition of equity, unless their debtor is insolvent, or has no visible property. *Id.*

CRIMINAL LAW.

1. CRIMINAL JURISDICTION OF COURTS OF JUSTICE for trial of causes upon indictment or information, is derived from the general law providing for the organization of courts of justice, and not from particular statutes declaring what shall constitute public offenses, and prescribing a punishment therefor. *State v. Wilbor*, 245.
2. AMENDATORY STATUTE PROVIDING FOR THE DISTRIBUTION OF A FINE imposed as a penalty for a public offense, which provides only for the distribution of such penalty in a manner different from that directed in the original act, does not affect the offense defined by such act, nor work a repeal of the penalty. *Id.*
3. INCREASED PENALTY IMPOSED BY A STATUTE FOR A SECOND CONVICTION of the offense described therein, is not regarded as an increased penalty imposed for the same offense, but as a new and distinct penalty provided for another and a separate offense. *Id.*
4. INDICTMENT WHICH CONCLUDES "AGAINST THE FORM OF THE STATUTE," will support a conviction, although the offense charged is the creation of several statutes. *Id.*
5. WORDS "WARRANT AND ORDER" MAY BE STATED CONJUNCTIVELY in indictment for forgery without vitiating it, although in the statute under which the indictment is framed the disjunctive expression "warrant or order" is employed. *State v. Jones*, 257.
6. NO MATERIAL VARIANCE EXISTS BETWEEN AN INDICTMENT FOR FORGERY and the proof adduced in support of it, where the indictment describes the forged instrument as a "paper writing," and the proof shows it to have been partly printed, and partly written. *Id.*
7. INDICTMENT NEED NOT SET FORTH that a bank was incorporated under the laws of this state or of the United States, by a specific allegation, but if it be averred that a forgery was committed, with intent to defraud a

- particular bank, describing it by its corporate name, and it appears that there is such a corporation incorporated by a public statute, the court will take judicial notice of such act of incorporation, and the indictment is sufficient without any further designation of the bank by its name. *Id.*
8. **AVERTMENT THAT AN INSTRUMENT WAS FORGED**, with intent to defraud an incorporated bank, is not rendered defective by the fact that the instrument, as set out in words and figures in the indictment, appears to be a check drawn upon the "cashier" of such bank. *Id.*
 9. **INDICTMENT CHARGING THAT A WRITTEN INSTRUMENT** purported to be the warrant and order of "Tristram Tupper," and then setting forth the instrument in words and figures in full, avers that it was forged with intent to defraud "Tristram Tupper," is not objectionable on the ground of variance, merely because the copy of the instrument shows that it was signed by "T. Tupper." *Id.*
 10. **CONVICTION FOR FORGERY IN SOUTH CAROLINA MAY BE SUSTAINED**, either under the act of 1736, or the act of 1801, or at the common law. *Id.*
 11. **INDICTMENT FOR OBTAINING GOODS BY FALSE PRETENSES, WHAT NECESSARY IN.**—It is an indispensable requisite of an indictment for obtaining goods by false pretenses that there be an absolute negative of the truth of the pretenses employed. *Tyler v. State*, 298.
 12. **WHERE GOODS ARE OBTAINED BY MEANS OF A COUNTERFEIT LETTER**, an averment in the indictment that the party whose name is signed to the letter "never did write or send, or cause to be written or sent any such letter," is a distinct and sufficient negative of the truth of the pretenses. *Id.*
 13. **INDICTMENT FOR OBTAINING GOODS BY FALSE PRETENSES** can be sustained, though the party who purported to be the drawer of the order had no interest in the goods obtained. *Id.*
 14. **PERSON INDICTED FOR CRIMINAL OFFENSE HAS RIGHT TO BE PRESENT** in court pending his trial, that he may discuss questions of law and fact, and point out and argue objections to the action of the jury, or to other proceedings in the cause. This right is guaranteed to him by sec. 10, art. 1, of the constitution of Alabama. *State v. Hughes*, 411.
 15. **ACCUSED HAS RIGHT TO BE PRESENT WHEN VERDICT IS RETURNED**, that he may have an opportunity to poll the jury if he so desires. *Id.*
 16. **NEW INDICTMENT NEED NOT BE PREFERRED** against a prisoner where a former judgment of conviction was reversed and the cause remanded for a new trial, unless the indictment was adjudged insufficient. *Id.*
 17. **RECEIVING VERDICT IN ABSENCE OF PRISONER** does not entitle him to a discharge. *Id.*
 18. **INFORMATION FOR A STATUTORY OFFENSE** is in general sufficiently definite and certain, if in the description of the offense it follow the words of the statute. *Whiting v. State*, 499.
 19. **IDEM.**—IN AN **INFORMATION FOR THE SALE OF SPIRITUOUS LIQUORS**, it is not necessary to state the amount, kind, or value of the liquor sold, unless the jurisdiction, or the nature or degree of the punishment, depends upon a consideration of these matters. *Id.*
 20. **CIRCUMSTANTIAL EVIDENCE NEED NOT BE SO CONCLUSIVE** in a criminal case as to exclude every possibility of the defendant's innocence, in order to justify his conviction. If the jury, from the evidence, are satisfied of the defendant's guilt beyond any reasonable doubt, they may convict

him, although there is no evidence proving or tending to prove it impossible for another person to have committed the crime. *Findley v. State*, 557.

31. DEFENDANT'S FAILURE TO DISPROVE SOME OF THE CIRCUMSTANCES proved against him in a criminal case should have no weight with the jury, if, from all the circumstances proved, they are not satisfied of his guilt beyond a reasonable doubt. *Id.*
32. CHANGE OF VENUE IN CRIMINAL CASE IS DISCRETIONARY, and a refusal thereof can not be assigned as error. *Id.*
33. REFUSAL OF CHANGE OF VENUE IN CRIMINAL CASE is not assignable as error. *Sumner v. State*, 561.
34. EVERY MATERIAL CIRCUMSTANCE MUST BE PROVED BEYOND A RATIONAL DOUBT to justify a conviction in a criminal case, and every circumstance not so proved should be discarded in making up the verdict. *Id.*
35. EVIDENCE NEED NOT BE SO CONCLUSIVE AS TO EXCLUDE EVERY POSSIBILITY that the crime might have been committed by another, to justify a conviction in a criminal case. *Id.*
36. CIRCUMSTANTIAL EVIDENCE SHOULD BE SO STRONG as to tend to convince the jury of the defendant's guilt, and to exclude every supposition inconsistent therewith, to warrant a conviction in a criminal case. *Id.*
37. INSTRUCTION IN CAPITAL CASE THAT STRONG MOTIVE MUST BE PROVED for the commission of the murder by the defendant, to justify his conviction, if the evidence is circumstantial, and does not show his guilt with absolute certainty, is properly refused. *Id.*

See EVIDENCE, 15, 17; STATUTES, 5, 7; WITNESSES, 1.

DAMAGES.

See CORPORATIONS, 25; COVENANTS, 2, 4; EMINENT DOMAIN, 11, 12; HIGHWAYS, 5; LIBEL; QUANTUM MERUIT, 2; SLANDER, 3; STATUTES, 10, 11.

DECREES.

See EQUITY, 1.

DEDICATION.

DEDICATION, WHAT NOT.—WHERE A TRACT FRONTING ON A RIVER, and adjoining a city wherein it is afterwards incorporated, is divided by its owner, on a plan thereof, into city lots, streets being laid off thereon in continuation of those of the city, and lots are sold with reference to such plan, if on the plan between the river and nearest parallel street a vacant strip is left, which is not divided into lots, but on which no word is written indicative of an intent to dedicate to the public, no presumption of an intention to dedicate such strip to the uses of commerce or otherwise to the public, will be presumed. It will be different, if on the vacant strip such a word as "quay," or other word indicative of such intent, is written. To the same point, *Garland, J. Municipality No. 3 v. Cotton Press*, 624.

DEEDS.

1. WHERE THE DESCRIPTIONS OF A CONVEYANCE CONFLICT, that which has the greater certainty must prevail. *Doe ex dem. Phillips' Heirs v. Porter*, 448.

2. **IDEM.—QUANTITY GIVES WAY TO BOUNDARIES** in case of conflict. *Id.*
 3. **IDEM.—A PARTICULAR DESCRIPTION WILL CONTROL** a general description of the same tract. *Id.*
 4. **RECITAL OF ONE DEED IN ANOTHER** binds the parties and those claiming under them by estoppel. Thus if a conveyance purport to be of land conveyed by a prior deed to which reference is made, the grantees can not contend that more passed than was included in the recited deed. *Id.*
 5. **PARTY TO A DEED IS NOT PERMITTED TO PROVE** that he has no title to the land conveyed, by virtue thereof, where the deed contains covenants or recitals inconsistent with the proof offered. *Thompson v. Thompson*, 751.
 6. **GRANTEE MAY FORTIFY HIS TITLE** by a subsequent deed from his grantor to the premises originally conveyed, and is not estopped from claiming that the title passed by the prior conveyance, if by so doing he do not prejudice the rights of others. *Id.*
 7. **DEED CAN NOT BE DEFEATED FOR ONE PURPOSE**, and relied upon for another. *Id.*
- See **ALTERATION OF INSTRUMENTS**, 4; **COVENANTS**; **EVIDENCE**, 13; **FRAUDULENT CONVEYANCES**; **INABILITY**, 1-4; **MARRIED WOMEN**, 1, 2; **MORTGAGES**, 6-8, 10, 12; **NOTICE**, 5; **PARTITION**; **PRIVIES**.

DEPOSITIONS.

See **PLEADING AND PRACTICE**, 14.

DEPUTIES.

See **EXECUTIONS**, 14; **SHERIFFS**.

DEVICES.

See **WILLS**.

DIVIDED NOTES.

See **LOST NOTES**, 3.

DIVORCE.

See **MARRIAGE AND DIVORCE**, 2-4.

DOMICILE.

RESIDENCE IS CHANGED where a man goes away with a determination of taking up a permanent residence in a particular place and does so take up his abode. Residence may be abandoned without evidence that another has been secured; but it is otherwise as to the place of legal settlement. *Phillips v. Kingfield*, 760.

DONATIO CAUSA MORTIS.

See **ALIENS**, 3.

EASEMENTS.

See **WAYS**.

EJECTMENT.

1. **PURCHASER UNDER VERBAL CONTRACT BEING IN POSSESSION** by his agent, the vendor or his grantee can not maintain ejectment without proof of

- a demand and refusal by the purchaser or agent or of a holding adversely before suit brought or demise laid. *Peters v. Allison*, 574.
2. **ADVERSE HOLDING OR DEMAND AND REFUSAL** are not to be implied from a defense to an ejectment brought by the vendor against a tenant of the purchaser in possession under a verbal contract of purchase. *Id.*
 3. **REFUSAL TO PERMIT DISCONTINUANCE AS TO TENANT** in possession, where his landlord has been admitted to defend in an action of ejectment, for the purpose of making him a witness against his landlord, is not error, because a discontinuance as to the tenant is a discontinuance of the whole action. *Id.*
 4. **VERDICT AND JUDGMENT IN EJECTMENT FOR PLAINTIFF WHO HAS CONVEYED** the land to another after action brought, and who, upon that fact being shown, recovers only his damages and costs, will not affect the title, and will not, in conjunction with a prior recovery in ejectment by the same plaintiff against the same defendant, conclude the latter in a subsequent ejectment brought against him by the plaintiff's grantee. *Blackmore v. Gregg*, 171.
 5. **BAR OF TWO VERDICTS IN EJECTMENT IS STATUTORY ESTOPPEL** which affects only parties and privies. *Id.*
- See EVIDENCE, 14; JUDGMENTS, 1; PARTITION; PRE-EMPTION, 3.

ELECTION.

See EQUITY, 3; WAGERS, 1-3.

EMINENT DOMAIN.

1. **PROPERTY OF CORPORATION IS SUBJECT TO RIGHT OF EMINENT DOMAIN** as well as the property of private persons. *Tuckahoe Canal Co. v. Tuckahoe R. R. Co.*, 374.
2. **ACT SUFFICIENTLY PROVIDES FOR COMPENSATION, WHEN.**—An act empowering a company to exercise the right of eminent domain, sufficiently provides for compensation when it refers to a general law as the law of the company; the general law prescribing the manner in which property shall be so taken. *Id.*
3. **CORPORATION EMPOWERED TO BUILD RAILROAD BETWEEN CERTAIN POINTS** has a right to build a bridge over the canal of a company previously incorporated, as an exercise of the right of eminent domain. *Id.*
4. **CONDEMNATION NEED NOT PRECEDE EXECUTION OF THE WORK**, and a corporation is not acting prematurely where it exercises a right of way before having the damages assessed; there is no absolute obligation on the corporation to institute process for assessing the damages, as in case of its default the owner may do so. *Id.*
5. **LOCATION OF RAILROAD BY A JURY** instead of by the company under an act authorizing the company to locate the road, such location to be approved by the court of quarter sessions upon report of a jury after a view, is no ground of objection to the location, for the provision being for the benefit of the company it may waive it, or the jury may be regarded as its agent. *Case of Philadelphia etc. R. R. Co.*, 202.
6. **EXCEPTION DEPENDING ON LITERAL INTERPRETATION OF STATUTE** authorizing the location of a railroad is not to be favored. *Id.*
7. **OBJECTION THAT JURORS WERE NOT SWORN** according to the general road law, under a special statute authorizing a view and report of the location

of a railroad by a jury of six, is unavailing where the statute prescribes no oath. *Id.*

8. "TAKING" OF PRIVATE PROPERTY FOR PUBLIC USE, within the meaning of the constitutional prohibition, refers to a taking of it altogether, and not to a mere consequential injury. *Id.*
9. MONOPOLIES ARE NOT PROHIBITED BY THE CONSTITUTION OF PENNSYLVANIA, and the legislature may, therefore, grant exclusive privileges to a railroad. *Id.*
10. TAKING PRIVATE PROPERTY FOR PUBLIC USE, WHAT IS.—The legislature can not authorize a public use, the natural result of whose operation will be to deprive the owner of adjoining property of its beneficial use, without allowing compensation to the party injured. It can not authorize a canal whose existence will cause the flooding of adjoining land, without allowing compensation. *Hooker v. New Haven etc. Co.*, 477.
11. IF THE LEGISLATURE FAIL TO PROVIDE A REMEDY for an injury occasioned by a public use, for which injury nevertheless the party injured is entitled to recover by reason of constitutional provisions, he will be remitted to his common law remedy for the recovery of the damages suffered. *Id.*
12. VERDICT UPON WHICH NO JUDGMENT IS ENTERED, assessing the damages which a party will sustain by reason of the laying out of a lateral railroad across his land, under the Pennsylvania statute of 1832, will not justify an entry and the making of the road, but the record of the proceedings is admissible in evidence to mitigate the damages. *Harvey v. Thomas*, 141.

See CONSTITUTIONAL LAW, 6; HIGHWAYS, 1-3.

EQUITABLE CONVERSION.

See EQUITY, 2, 3;

EQUITY.

1. DROUSEN IN EQUITY OPERATES IN PERSONAM, and can not *per se* divest the legal title. *Proctor v. Ferebee*, 34.
2. LAND IS CONSIDERED BY EQUITY AS CONVERTED INTO PERSONALTY by a direction in a will that it shall be sold, and from the proceeds thereof a fund established for the payment of debts and legacies. *Id.*
3. PERSONS ENTITLED TO THE PROCEEDS of the sale of land, may elect to take the land itself. *Id.*
4. BILL AGAINST TWO DEFENDANTS TAKEN PRO CONFESSO AGAINST ONE for want of his appearance, will not estop the other from denying or disproving the allegations in the bill. *Petty v. Hannum*, 303.

See CREDITORS' BILLS; FRAUD, 2; INJUNCTIONS; INTERPLEADER; JUDICIAL SALES; RESCISSION OF CONTRACTS.

ERROR.

See PLEADING AND PRACTICE.

ESTATES OF DECEASED PERSONS

See CONSTITUTIONAL LAW, 3; EXECUTORS AND ADMINISTRATORS.

ESTOPPEL.

MATTER OF ESTOPPEL, TO HAVE EFFECT, MUST BE PLEADED, except where there has been no opportunity so to do, in which case it may be given in evidence with the same conclusive effect as if pleaded. *Isaacs v. Clark*, 372.

See DEEDS, 4-6: EJECTMENT, 5; EQUITY, 4.

EVIDENCE.

1. **FOREIGN LAWS MUST BE PROVED** as facts, and will not be judicially noticed. *Phillips v. Gregg*, 158.
2. **EVIDENCE TO PROVE FOREIGN LAW** must be the best of which the nature of the case admits. Ordinarily, written laws of a foreign country must be proved by duly authenticated copies, and the unwritten law by the testimony of persons skilled therein; but this rule is not universal. *Id.*
3. **TESTIMONY OF PERSONS UNLEARNED IN THE LAW** that prior to 1791 it was customary for protestant settlers in the Spanish colony of Mississippi to be married by a justice of the peace, under a regulation to that effect adopted by the governor or superintendent, is admissible to uphold a marriage so celebrated, unless the party objecting thereto shows that better evidence is attainable. *Id.*
4. **PART OF RECORD, WHERE REMAINDER IS SHOWN TO HAVE BEEN LOST**, is admissible in evidence, with parol proof of the contents of the part lost. *Harvey v. Thomas*, 141.
5. **ENTRY IN FAMILY RECORD AS TO BIRTH OF CHILD IS ADMISSIBLE EVIDENCE** in an action brought by the father against a justice for unlawfully solemnizing a marriage with such child while a minor, and the testimony of the father is admissible to prove such entry. *Carskadden v. Poorman*, 145.
6. **UNAIDED COMPARISON OF HANDS IS GENERALLY INADMISSIBLE** in Pennsylvania, but such evidence is admissible in corroboration of previous testimony. *Baker v. Haines*, 224.
7. **WRITING USED AS STANDARD IN COMPARISON OF HANDS** must be proved to be genuine by evidence leaving no reasonable doubt, as by the testimony of persons who saw the party write it, or by an admission of its genuineness, or other evidence equally certain; and it can not be proved by the opinions of witnesses. *Id.*
8. **SIGNATURES PROVED TO BE IN A DEFENDANT'S HANDWRITING** can not be given in evidence to the jury, to enable them to determine, by a comparison with a disputed signature, whether the latter is genuine or not. *Little v. Beasley*, 431.
9. **DESCRIPTION OF A LOCUS IN QUO MAY BE PROVED BY PAROL**, as a matter of reputation. *Davis v. Fuller*, 334.
10. **PAROL EVIDENCE OF THE STATEMENTS OF PERSONS** competent to be witnesses, when against their interest, can not be given without proof of their death, especially when such statements are mere matters of opinion. *Id.*
11. **BOOK OF ENTRIES MANIFESTLY ERASED AND ALTERED** in a material point, unless explained so as to do away with the presumptions against it existing on its face, should not be admitted in evidence. *Churchman v. Smith*, 211.
12. **ENTRIES MADE BY CLERK AND CARTER, WHO DELIVERS GOODS**, from his

memoranda immediately upon his return from making such delivery, are original entries. *Id.*

12. DEED FROM PERSONS CLAIMING TO BE HEIRS of a former owner of land is not admissible in evidence without proof that they are heirs. *Watson v. Gregg*, 176.
14. PREPONDERANCE OF EVIDENCE ON DEFENDANT'S PART is not necessary to overcome a *prima facie* case in favor of the plaintiff's right to recover in ejectment; equiponderance of evidence is sufficient. *Wall v. Hill's Heirs*, 578.
15. OVERRULING OBJECTION TO PROOF OF DEFENDANT'S STATEMENTS in answer to promise of favor by a witness, by assisting to clear him of a charge of crime, if he would state certain facts to the witness, is not error where the statements, when introduced, show on their face that they were not made in any expectation of procuring the promised benefit, and that they could not have any tendency to procure such benefit. *Fendley v. State*, 557.
16. PAROL EVIDENCE IS NOT ADMISSIBLE TO ADD TO OR VARY THE MEANING of the terms of a written contract; and can not, therefore, be received for the purpose of showing that a written assignment on the back of a certificate of stock in a corporation, of "all the right, title, and interest" of the assignor, was accompanied by a warranty of good title. *Osgood v. Davis*, 708.
17. DATE OF A FORGED CHECK IS SUFFICIENT EVIDENCE of the place where it was made, if it be shown also that the defendant was in that place at the date of the check and had it in his possession. *State v. Jones*, 257.
18. REPUTATION AND PUBLIC NOTORIETY ARE EVIDENCE of ownership in an action for damages for injuries caused by the negligence with which an omnibus alleged to be owned by defendants, was driven. *Hart v. New Orleans etc. R. R. Co.*, 689.

See CONFLICT OF LAWS, 3; COUNTERFEIT BILLS, 3; CRIMINAL LAW, 20, 21, 24-26; ESTOPPEL; FRAUD, 1; GARNISHMENT, 1, 2, 4; HUSBAND AND WIFE; INSANITY, 5; JURY AND JURORS, 4; LIBEL; MALICIOUS PROSECUTION, 2; MARRIAGE AND DIVORCE, 5-9; NEGLIGENCE, 7; NEGOTIABLE INSTRUMENTS, 21, 24, 28; PAYMENT, 2-4; PLEADING AND PRACTICE, 9-11, 15, 24; PUBLIC LANDS, 3-5; SLANDER, 1, 2; USAGE; WITNESSES.

EXECUTIONS.

1. SHERIFF LEVYING ON SEVERAL ARTICLES, ONE OF WHICH IS EXEMPT from execution, is not liable in trespass therefor, where the debtor fails to elect before levy which of them he will claim as exempt. *McGee v. Anderson*, 570.
2. SHERIFF REFUSING TO ALLOW CLAIM OF EXEMPTION made on day of sale and proceeding with the sale, where several articles are levied on, one of which may be claimed as exempt, does not become a trespasser *ab initio* unless the debtor tenders in lieu of that claimed other property which is of equal value, or palpably sufficient to discharge the debt, or which is the only property which the sheriff could have levied on if the exemption had been claimed before levy. *Id.*
3. OFFICER RECEIVING AND LEVYING EXECUTION MUST PERFECT IT, by the rule of the common law, by performing every act required to be done under or by virtue of the writ. *Elkin v. People*, 541.

4. OFFICER SELLING LAND ON EXECUTION MAY RECEIVE REDEMPTION MONEY, even after the expiration of his term of office. *Id.*
5. SURETIES OF SHERIFF RECEIVING REDEMPTION MONEY after his term has expired, upon land previously sold by him, are liable therefor. *Id.*
6. SHERIFF'S DEED CAN NOT BE COLLATERALLY IMPRACHED for any irregularity in his proceedings, or in the process under which he acts. In such a case a judgment, execution thereon, a levy, and the sheriff's deed are all that need be shown. *Ware v. Bradford*, 427.
7. STATUTE REQUIRING SHERIFF TO ADVERTISE LANDS which he is about to sell under execution, thirty days before the sale, is merely directory. *Id.*
8. EXECUTION MAY BE LEVIED ON THE DAY ON WHICH IT IS RETURNABLE, and a commitment thereon is valid. *Fletcher v. Bradley*, 324.
9. SHERIFF HAVING AN EXECUTION IN HIS HANDS, and a reasonable opportunity presenting itself to execute it by a commitment of the debtor's body, must do so. *Id.*
10. FAILURE TO RETURN AN EXECUTION within the time commanded, after complete service of the same, without proof of actual loss, will not entitle a judgment creditor to an action on the case against the sheriff. *Id.*
11. SHERIFF ACTING UNDER SPECIAL INSTRUCTIONS, giving him a discretion in the enforcement of a writ, is not liable for the exercise of such discretion. *Id.*
12. EXECUTION FIRST LEVIED HAS PRIOR LIEN though it be a junior execution, and comes last to the officer's hands, where different executions against the same defendant are delivered to different officers for service. *Million v. Commonwealth*, 580.
13. EXECUTION FIRST RECEIVED BY OFFICER HAVING SEVERAL EXECUTIONS against the same defendant placed in his hands at different times, must be first levied and paid. *Id.*
14. SEVERAL EXECUTIONS DELIVERED TO DIFFERENT DEPUTIES OF SAME SHERIFF, at different times, must be regarded as delivered to the sheriff personally, for the purpose of determining the right to priority of levy and satisfaction, and the writ first delivered to any of the deputies must be first paid out of the proceeds of a sale made by any other of the deputies on a writ subsequently received, if the prior writ is brought to the notice of the deputy making the sale before he has actually paid over the money, and for a refusal so to apply the proceeds the sheriff is liable on his bond. *Id.*
15. SHERIFF LEVYING EXECUTION IS REGARDED AS PLAINTIFF'S AGENT, in some degree, so far as he does not exceed the mandate of his writ; especially in case of a levy on realty. *Kirkpatrick v. Black*, 182.
16. CREDITOR PROCURING LEVY ON ENTIRE TRACT, of which he is part owner in conjunction with his debtor under an agreement whereby the latter, for a share in the land, is to make settlement upon the whole tract, and the former to procure title from the state, and to pay the purchase money, forfeits his rights as against a purchaser under the execution, and such purchaser obtains a good title. So notwithstanding some evidence that he knew of the agreement. *Id.*
17. SHERIFF IS PRESUMED TO BE RIGHTFULLY IN POSSESSION of property taken in execution. *Wafer v. Pratt*, 681.
18. PERSON CLAIMING PROPERTY TAKEN BY A SHERIFF IN EXECUTION, must,

in a suit against the officer, establish a clear and perfect right or title.
Id.

19. PURCHASER OF LEASED PROPERTY ON EXECUTION AGAINST THE LESSOR, is not entitled to rent paid in advance after the rendition of the judgment, in accordance with a stipulation in the lease. *Farmers' etc. Bank v. Eye*, 130.
20. PURCHASER ON EXECUTION MAY DRAFFIRM LEASE of the premises executed after the rendition of the judgment under which he purchased, by giving the tenant notice to quit, but if he does so he is not entitled to rent. *Id.*
21. PURCHASER AT SHERIFF'S SALE WILL NOT BE DECLARED TRUSTEE for the debtor where he has paid the purchase money, and is guilty of no fraud, merely upon proof of a parol agreement on his part to purchase the land for the debtor, such an agreement being within the statute of frauds. *Haines v. O'Conner*, 180.
22. FORM OF SHERIFF'S DEED.—A sheriff's deed is sufficient if it shows that the officer had authority to sell; therefore where the deed recites the execution, and the names of the parties as therein stated, it is sufficient, though in referring to the judgment it does not again recite the names nor state the amount of the judgment except as it appears upon the execution. *Perkins' Lessee v. Dibble*, 97.
23. MORTGAGE OF PROPERTY EXEMPT FROM EXECUTION does not render such property or the equity of redemption therein subject to execution by the mortgagor's creditors. *Collett v. Jones*, 586.
24. EXECUTION ISSUED ON A DORMANT JUDGMENT IS IRREGULAR, but not void, and can be set aside. *Brown v. Long*, 43.

See GARNISHMENT; MORTGAGES, 9; REPLEVIN, 3; SHERIFFS.

EXECUTORS AND ADMINISTRATORS.

1. PURCHASER AT EXECUTOR'S SALE OF LANDS, the equitable title to which was acquired by the testator after the execution of the will, may rescind the contract, notwithstanding the holder of the legal title offers to deliver to him a conveyance of the lands. Such purchaser will not be compelled to receive a title that may be disputed, and the minor heirs of the deceased would not be precluded from asserting their title after they came of age. *Meador v. Sorsby*, 432.
2. ORDER OF COUNTY COURT DIRECTING ADMINISTRATOR WITH WILL ANNEXED to sell lands, acquired by the testator after the execution of the will, is null. *Id.*

See NEGOTIABLE INSTRUMENTS, 29.

EXEMPTION.

See EXECUTIONS, 18, 23.

FACTORS.

See AGENCY, 4, 5.

FALSE PRETENSES.

See CRIMINAL LAW, 11-13.

FALSE REPRESENTATIONS.

See SLANDER, 5, 6; RESCISSION OF CONTRACTS, 1.

FIXTURES.

See PUBLIC LANDS, 8.

FORBEARANCE.

See ANNUITIES, 1.

FORGERY.

See CRIMINAL LAW, 4-10; EVIDENCE, 17.

FRANCHISES.

See QUO WARRANTO.

FRAUD.

1. FRAUD WILL NOT BE PRESUMED, and the burden of proof to establish it is upon the party who alleges it. *Nichols v. Patten*, 712.
 2. COURTS OF LAW AND EQUITY HAVE CONCURRENT JURISDICTION in cases of fraud. *Jamison v. Beaubien*, 534.
- See JUDGMENTS, 5, 6; PRE-EMPTION, 3.

FRAUDULENT CONVEYANCES.

1. CONVEYANCE, WHEN SET ASIDE ON THE LEGAL INFERENCE OF FRAUD, in the absence of any evidence of a corrupt agreement between the parties, will be allowed to stand as security for any consideration advanced by the grantee. *Anderson v. Fuller*, 290.
2. SIMULATED CONTRACT BY WHICH A TRANSFER OF PROPERTY is made to an apparent vendee, is not necessarily fraudulent so as to deprive the vendor of his right to compel the apparent vendee to comply with the conditions of the transfer, unless the object of the transfer was itself unlawful, or was intended to injure or defraud third persons. *Gravier's Owator v. Carraby's Ex'r*, 608.
3. CONTRACT BY WHICH AN APPARENT VENDEE AGREED TO SELL the property as his own, and after deducting the amount of certain loans and advances made to the vendor to repay to the vendor the excess of the proceeds of the sale, the principal object being to defeat the claims of certain judgment creditors of the transferor, is fraudulent, and no action will lie by the transferor or his representatives to recover the surplus agreed to be repaid. *Id.*
4. BONA FIDE PURCHASER FROM FRAUDULENT VENDEE gets a good title, unaffected by the fraud. *Swift v. Holdridge*, 85.
5. VENDEE IN CONVEYANCE TO DEFRAUD CREDITORS IS TRUSTEE for the latter while the property remains in his hands; upon a conveyance by him, the trust ceases. *Id.*
6. CONVEYANCE TO DEFRAUD CREDITORS IS BINDING on the parties thereto, who can not set up, against each other, the fraud on the creditors; and the vendee who loses his title by the acts of the vendor may recover against him. The vendor may, therefore, be a witness either to defeat

or to sustain such conveyance, his interest being a balanced one in either case. *Nichols v. Patten*, 713.

See SALES, 2-4.

GAMING.

HORSE-RACING OR HORSE-TROTTING IS A GAME within the statute "to prevent gaming for money or other property." And money lost by betting on a trotting match may be recovered back by the loser. The statute, with respect to the party losing, is remedial, not penal. *Ellis v. Beale*, 726.

See WAGERS.

GARNISHMENT.

1. GENERAL ISSUE IN ASSUMPSIT WILL LIE IN PROOF OF A PREVIOUS GARNISHMENT by which the debt now sued for was recovered from defendant. *Cook v. Field*, 436.
2. PAROL EVIDENCE IS ADMISSIBLE TO IDENTIFY THE DEBT recovered by judgment against the defendant as garnishee with that sued upon, if the identification does not appear upon the face of the record. *Id.*
3. JUDGMENT AGAINST A GARNISHEE IS NOT A DEFENSE when sued by his original creditor, unless the judgment has been satisfied. *Id.*
4. DISCLOSURE OF TRUSTEE AND JUDGMENT UPON IT ARE ADMISSIBLE in evidence, only between those who are parties to the suit. *Pitts v. Moser*, 727.

See ATTACHMENTS, 11, 12, 18.

GIFTS.

See ALIENS, 3; CORPORATIONS, 2.

GRANTS.

See DEEDS; PRE-EMPTION; PUBLIC LANDS.

GUARDIAN AND WARD.

1. AUTHORITY CONFERRED ON TESTAMENTARY GUARDIANS IS JOINT AND SEVERAL; it is coupled with an interest; if one dies it will go to the survivor, and where one refuses, the other may qualify without him. *Kear v. Waller*, 391.
2. TO CONSTITUTE A GUARDIAN, EXPRESS WORDS OF APPOINTMENT ARE NOT NECESSARY; any words will do if the father's intent is apparent; but the language must be such as to imply a right to the custody, control, and protection of the ward. *Id.*
3. LANGUAGE NOT A SUFFICIENT APPOINTMENT, WHEN.—Where a testator bequeathed his son a certain sum of money to be invested as his executors should think best, and also ordered "from the proceeds or dividends to educate him in the best manner under the direction of my said executors," this language is not sufficient to constitute his executors testamentary guardians. *Id.*

HANDWRITING.

See EVIDENCE, 6-8.

HIGHWAYS.

1. HIGHWAYS ARE THE PROPERTY OF THE STATE, subject to its absolute direction and control. *Case of Philadelphia etc. R. R. Co.*, 202.
2. STREETS OF INCORPORATED TOWN ARE PUBLIC HIGHWAYS, and the regulation thereof given to the corporation for corporate purposes is subject to the paramount right of the state to provide for a more general and extended use of them. *Id.*
3. LEGISLATURE MAY AUTHORIZE LAYING OF RAILROAD IN A STREET without providing compensation to the owner of the soil, this not being a "taking" of his property, but merely a change in the use of the public right of way over it. *Id.*
4. CITIZENS HAVE RIGHT TO TRAVEL OVER WHOLE WIDTH OF HIGHWAY without being subjected to other or greater dangers than may be presented by natural obstacles, or those occasioned by making and repairing the traveled path. *Johnson v. Whitefield*, 721.
5. TOWN IS LIABLE FOR DAMAGES arising from its having allowed the sides of the traveled path of a public highway to be incumbered with logs or other things unnecessarily placed there. *Id.*

See WATERCOURSES, 10.

HOLIDAYS.

See NEGOTIABLE INSTRUMENTS, 27.

HUSBAND AND WIFE.

ADMISSIONS OF WIFE ARE NOT ADMISSIBLE to charge her husband in an action against them for an assault and battery committed by her. *Hussey v. Wood*, 420.

See MARRIAGE AND DIVORCE; MARRIED WOMEN; WITNESSES, 1.

ILLEGAL CONTRACTS.

1. ACTION TO ENFORCE AN UNLAWFUL CONTRACT can not be maintained. *Gravies's Operator v. Carraby's Ex'r*, 606.
2. CONTRACT, THE CONSIDERATION OF WHICH RELATES to the perpetration of a fraud or contemplates the performance of an act prohibited by law, is unlawful and can not be enforced. *Id.*

IMPROVEMENTS.

IMPROVEMENTS MADE BY A TENANT AT WILL inure to the benefit of the landlord, and can not be reached by the tenant's judgment creditors. *Pomeroy v. Lambeth*, 33.

See CO-TENANCY, 16; PUBLIC LANDS, 6, 8.

INDICTMENT.

See CRIMINAL LAW, 4-9, 11-13, 16, 18, 19.

INDORSEMENT.

See BANKS AND BANKING, 3; NEGOTIABLE INSTRUMENTS.

INFANCY.

1. CONTRACT OF AN INFANT IS VOIDABLE only, not void, and he can not, while

an infant, disaffirm it, except in case of evident necessity. *Farr v. Sumner*, 327.

2. INFANT CAN NOT, AFTER ARRIVING AT AGE, DISAFFIRM his contract, and recover back property transferred without restoring the consideration received by him. *Id.*
3. INFANT MAY RESCIND CONTRACT OF EXCHANGE though he thereby obtains property necessary for his use. *Grace v. Hale*, 296.
4. HORSE IS NOT NECESSARY FOR AN INFANT, though the latter was permitted to cultivate a portion of his father's land for his own benefit. *Id.*

See MARRIAGE AND DIVORCE, 4; PARENT AND CHILD.

INJUNCTIONS.

1. BILL IN EQUITY FOR AN INJUNCTION AGAINST A PUBLIC NUIRANCE will not be entertained unless it shows that the plaintiff will sustain a special or peculiar damage from it, an injury distinct from that done to the public at large. *Bigelow v. Hartford Bridge Co.*, 502.
2. INJUNCTION WILL NOT BE GRANTED unless the violation of plaintiff's rights which it is sought to enjoin is such as is or will be attended with actual and serious damage. Where the damage that will be done is very small, no injunction will be granted, even though an action at law might lie. *Id.*
3. INJUNCTION WILL NOT BE GRANTED AGAINST AN INJURY which neither exists nor is threatened by defendant, but which plaintiff apprehends may be brought about by future acts of the defendant, if those which he seeks to enjoin are not prevented. *Id.*

See PRE-EMPTION, 1.

INQUISITION.

See INHABIT, 2.

INSANITY.

1. HEIRS OF GRANTOR WHO WAS OF UNSOUND MIND at the time of conveyance, may recover in ejectment against the grantee, without restitution of the purchase money. *Wall v. Hill's Heirs*, 578.
2. GRANTEE, IN CONVEYANCE VOIDABLE ON GROUND OF GRANTOR'S INSANITY, IS ESTOPPED, in an action of ejectment brought by the grantor's heirs, to deny the grantor's title. *Id.*
3. INQUISITION AFTER MAKING OF DEED FINDING GRANTOR INSANE, and legally incapable of contracting at the time of the execution of such deed, though *ex parte*, is *prima facie* evidence against the grantee in ejectment brought by the grantor's heirs. *Id.*
4. CAPACITY TO TRANSACT BUSINESS "WITH JUDGMENT AND DISCRETION," is not necessary to be shown to support the validity of a deed of a grantor against an inquisition, subsequent to the execution of the deed, finding him to have been of unsound mind and incapable of managing his affairs at that time; as indiscretion and defect of judgment may exist without legal incapacity. *Id.*
5. INSANITY MUST BE SHOWN BY CLEAR AND CONVINCING PROOF to the satisfaction of the jury, where it is set up as a defense in a criminal prosecution; but if the jury entertain a reasonable doubt of the defendant's sanity, they should acquit him. *State v. Marler*, 396.

INSOLVENCY.

See ASSIGNMENT FOR BENEFIT OF CREDITORS.

INSTRUCTIONS.

See CRIMINAL LAW, 27; PLEADING AND PRACTICE, 16-22.

INSURANCE—FIRE.

1. CONTRACT OF SALE, EFFECT OF ON RIGHT TO INSURANCE. —Where the insured enters into a contract to convey the premises, but before the contract is executed the premises are destroyed by fire, he retains such an interest that he can maintain an action on the policy. *Wheeling Ins. Co v. Morrison*, 385.
2. CONDITION IN POLICY OF INSURANCE, that a transfer, if made without the consent of the insurers, shall render the policy void, relates to conveyances by which the interest of the insured is absolutely and permanently divested. *Power v. Ocean Ins. Co.*, 665.
3. POLICY IS NOT AVOIDED BY A SALE OF THE INSURED PROPERTY, when, before the happening of the loss, the property had reverted to the original owner, by reason of the vendee's failure to pay the purchase price as agreed by the terms of the sale. *Id.*
4. CONDITIONAL SALE OF INSURED PROPERTY suspends the risk during the existence of the condition, but the reversion of the property to the vendor upon the failure of the condition revives the risk, and entitles the vendor to all the rights possessed by him before the property was transferred. *Id.*

INSURANCE—MARINE.

1. PURCHASE OF INSURED PROPERTY BY THE OWNER at a sale for the benefit of all concerned, is equivalent to a revocation of his prior abandonment, and will preclude him from recovering on a claim for a total loss. *Robertson v. Western M. & F. Ins. Co.*, 673.
2. PARTICULAR USAGE AND CUSTOM, by which owners of insured property were permitted to purchase the property at sales for the benefit of the insurers, can not have the effect of legalizing a sale which, by the general law, is unlawful and void. *Id.*
3. MASTER MAY SELL INSURED CARGO for the benefit of all concerned, where it has been so damaged by the perils of navigation, that no practicable course remains to be pursued by which it can be restored to its original state, or preserved from total loss. *Id.*
4. AFTER ABANDONMENT, THE INSURED, IN MAKING SALE of the insured property, becomes the agent of the insurers. *Id.*
5. SALE OF VESSEL AND CARGO DAMAGED BY ACCIDENT is justified only in case of urgent necessity, and after the master has employed due diligence to discover whether other available means of saving either were within his reach. *Caldwell v. Western M. & F. Ins. Co.*, 667.
6. DUE DILIGENCE IN SUCH CASE depends upon the facts. The master is invested with a discretion depending upon the circumstances, and if it appear that he exercised this power with ordinary good judgment, fairness, and promptitude, the necessity of the sale will be presumed. *Id.*
7. COMPETENT CREW IS ESSENTIAL TO THE SEAWORTHINESS of an insured vessel,

and if not provided at the commencement of the risk this will constitute a ground for avoiding the policy. *Id.*

8. **WARRANTY OF SEAWORTHINESS IS NOT BROKEN** by the occasional absence of a seaman or deck-hand upon other duties connected with the voyage, as to procure water or provisions, especially when his presence at his post of duty would not have prevented a particular loss by accident. *Id.*

INTERPLEADER.

1. **BILL OF INTERPLEADER, TO DETERMINE THE OWNERSHIP OF PROPERTY** taken under execution, can not be maintained by a sheriff, against those ordering the execution, and persons asserting a hostile interest in the property seized. *Quinn v. Green*, 46.
2. **BILL OF INTERPLEADER MUST ADMIT A TITLE AGAINST THE PLAINTIFF** in all of the defendants. Such bill, which states that as to some of the defendants plaintiff is a wrong-doer, can not be sustained. *Id.*

JOINT CONTRACTORS.

See NOTICE, 4; PAYMENT, 5; PLEADING AND PRACTICE, 2.

JOINT TENANTS.

See CO-TENANCY, 12.

JUDGMENTS.

1. **JUDGMENT IN AN ACTION OF EJECTMENT** can not be collaterally attacked by any of the parties or their privies; but strangers may show that such judgment was fraudulent and collusive, and obtained by an attorney without any authority from his assumed client. *Atkinsons v. Allen*, 361.
2. **JUDGMENT NOT IN REM IS NEVER CONCLUSIVE** except upon the very matter in judgment, and between the very same parties or their privies either in blood or estate. As to all others, the judgment may be impeached and contradicted by collateral evidence. *Nason v. Blaisdell*, 331.
3. **FINAL JUDGMENT IN FAVOR OF A DEFENDANT MAY BE ENTERED** upon an appeal from a judgment of nonsuit in his favor, when the proceeding is a petitory action to try title, and the defendant exhibits the best title to the lands in question. *Guidry v. Woods*, 677.
4. **JUDGMENT AGAINST ONE JOINT OWNER OF CHATTEL** in an action brought by him for an injury thereto precludes him from maintaining with his co-owner a subsequent joint suit for the same injury; and such misjoinder may be taken advantage of by a plea in bar or in abatement, or by a motion for a nonsuit. *Brizendine v. Frankfort Bridge Co.*, 587.
5. **COURT OF LAW MAY VACATE AND SET ASIDE ITS JUDGMENT** when founded in fraud, or rendered under circumstances of surprise or mistake such as to entitle the injured party to relief against it. *Dial v. Furrow*, 267.
6. **PRACTICE UPON MOTION TO SET ASIDE A JUDGMENT AT LAW FOR FRAUD**, is for the court to cause an order to be entered, after a sufficient showing has been made in support of the motion by appropriate affidavits, requiring the plaintiff to show cause, at an appointed time, why the judgment in his favor should not be set aside and vacated. *Id.*

7. VERDICT AND JUDGMENT ARE NOT CONCLUSIVE as to matters incidentally brought in question. *Blackmore v. Gregg*, 171.

See CONTRIBUTION; CREDITORS' BILLS, 2; EJECTMENT, 4, 5; EQUITY, 1; EX-
EMPTIONS, 24; GARNISHMENT, 3, 4; JURY AND JURORS, 5; JUSTICES OF
THE PEACE, 3, 6; PARTNERSHIP, 3; PROCESS, 3.

JUDICIAL SALES.

1. RIGHT TO SET ASIDE SALE made by order of a court of chancery is one of the attributes of that court. *Littell v. Zantz*, 415.

2. ENGLISH RULE, TO OPEN SALE whenever advance of ten per cent. on the former sale is offered, is not adopted in Alabama, being manifestly unsuitable to the habits of our people, and to the state of things existing amongst us. *Id.*

See MORTGAGES, 1-5.

JURISDICTION.

See CRIMINAL LAW, 1; FRAUD, 2; JUSTICES OF THE PEACE, 1, 2; MARRIAGE AND DIVORCE, 2; PUBLIC LANDS, 1; STATUTES, 6.

JURY AND JURORS.

1. JUROR HAVING FORMED DECIDED OPINION, which is positive and not hypothetical, upon the merits of the case, either from personal knowledge, from statements of witnesses or of parties, or from rumor, which opinion will probably prevent him from giving an impartial verdict, is subject to challenge for cause. *Smith v. Eames*, 515.

2. LIGHT, TRANSIENT, OR HYPOTHETICAL OPINION FORMED BY JUROR, which may be changed, and which does not show a conviction of the mind and a fixed conclusion upon the case, is not a good ground of challenge; and a full examination may be allowed if necessary to ascertain the state of the juror's mind. *Id.*

3. OPINION FORMED BY JUROR FROM RUMOR as to which party in the case ought to succeed, where he states on his examination that he still retains that opinion if what he has heard is true, but is not asked as to whether or not he believes it to be true, is not a good ground of challenge. *Id.*

4. AFFIDAVITS OF JURORS TO IMPEACH THEIR VERDICT by showing that they misunderstood the instructions, and without such misunderstanding would not have found as they did, are inadmissible. *Id.*

5. INCOMPETENCY OF A JUROR IS NO GROUND FOR ARRESTING JUDGMENT, although it may be good cause for a new trial. *Atkinsons v. Allen*, 361.

6. IMPANELING A JUROR ON A FORMER TRIAL, if no verdict or other expression of opinion is given, is not a sufficient ground for challenge. *Id.*

See PLEADING AND PRACTICE, 15; RESCISSION OF CONTRACTS, 3; VERDICT.

JUSTICES OF THE PEACE.

1. JURISDICTION AND POWERS OF JUSTICES OF THE PEACE are derived from statutory provisions. *Martin v. Fales*, 693.

2. GRANTING OF WRIT AND ISSUANCE OF SUBPENAS are the only powers that can be exercised by the justice, before the time for trial appointed in the writ. After that time arrives, if the plaintiff fails to appear and prosecute, the justice must render judgment for costs in favor of the defend-

ant; if the defendant fails to appear, judgment must be rendered for the plaintiff; if the justice fails to appear at the time, or within a reasonable time thereafter, the suit fails, except in those cases provided for in the statute. *Id.*

2. WHERE NEITHER JUSTICE NOR PLAINTIFF APPEARS at time and place of trial, there is a failure to prosecute, which puts an end to all further proceedings. *Id.*
 4. NOTHING LESS THAN ACTUAL RESISTANCE OR DANGER can justify a court of justice in concluding that the administration of the law is superseded, and that the course of justice must give way to lawless violence. *Id.*
 5. MERE APPREHENSION OF FUTURE DANGER WILL NOT JUSTIFY a justice of the peace in disregarding the rules prescribed by law. *Id.*
 6. RECORD OF A JUSTICE OF THE PEACE IS AS CONCLUSIVE as that of any other court. It can be tried by inspection only, and is conclusive of every fact stated therein, until regularly set aside. *Spaulding v. Chamberlin*, 353.
- See CONTINUANCE; MARRIAGE AND DIVORCE, 1, 8; PROCESS, 2.

LANDLORD AND TENANT.

TENANT'S LIABILITY FOR RENT, WHEN PREMISES ARE DESTROYED.—Where tenant leases certain property for a specified time, and in the contract agrees to pay a certain sum yearly for rent, and makes no reservation on account of accidents, his contract to pay rent is express, and he is liable therefor, though the premises are destroyed before the expiration of the time. *Live v. Ross*, 95.

See EJECTMENT, 2, 3; IMPROVEMENTS.

LEASES.

See EXERCUTIONS, 19, 20.

LEGACIES.

See WILLS.

LEGISLATURE.

See CONSTITUTIONAL LAW.

LIBEL.

1. OTHER PARTS OF PAMPHLET ALLEGED TO BE LIBELOUS in certain paragraphs may be read in evidence by the defendant to explain the paragraphs upon which the action is founded, to show the motive and intent of the publication and mitigate the damages. *Morehead v. Jones*, 600.
2. EVIDENCE IN MITIGATION OF DAMAGES is admissible notwithstanding a plea of justification. *Id.*

LIENS.

See ATTACHMENTS.

LOST NOTES.

1. LOST NOTE NOT NEGOTIABLE, OR NOT TRANSFERRED IF NEGOTIABLE, may be recovered on in an action at law. *Lazell v. Lazell*, 352.
2. INDEMNITY MUST BE GIVEN BEFORE A RECOVERY can be had on a lost negotiable instrument actually transferred. *Id.*

3. OWNER OF BANK NOTE DIVIDED FOR PURPOSE OF TRANSMISSION, where one half is lost through the mail, may recover from the bank on presentation of the other half, for the lost half not being separately negotiable, the bank can never be injured by it. *State Bank v. Aersten*, 536.

MALICIOUS PROSECUTION.

1. PROSECUTION IS TERMINATED BY ENTRY OF NOLLE PROSEQUI; the accused may then sue for a malicious prosecution. *Yocum v. Polly*, 583.
2. DISCHARGE BY NOLLE PROSEQUI IS NOT PRIMA FACIE EVIDENCE OF MALICE or of want of probable cause to sustain an action for malicious prosecution. *Id.*
3. MALICE AND WANT OF PROBABLE CAUSE MUST BOTH BE ALLEGED AND PROVED in an action for malicious prosecution, and though the former may be inferred from the latter, the latter can not be inferred from the former. *Id.*
4. PARTY ACTING IN SUBORDINATION TO COMMONWEALTH'S ATTORNEY, in a prosecution instituted by the latter's direction, from information derived from others, is not liable for a malicious prosecution, though he is actuated by malice against the accused. *Id.*

MARRIAGE AND DIVORCE.

1. MARRIAGE SOLEMNIZED BY PERSON HOLDING OFFICES OF JUDGE of the peace and judge of a municipal court is legal, and where the certificate is silent as to the capacity in which he acted in performing the ceremony, the law will assume that he acted in the capacity in which he might lawfully perform it. *Jones v. Jones*, 723.
2. STATUTE OF MAINE GIVING TO ONE JUDGE JURISDICTION in cases of divorce, gives him jurisdiction in questions of alimony. *Id.*
3. DECISION OF JUDGE, IN SUCH CASES, ON A QUESTION OF FACT, can not be appealed from, but is as conclusive as the finding of a jury. *Id.*
4. INFANT WIFE MAY MAINTAIN SUIT FOR DIVORCE, in her own name, without acting by guardian or next friend. *Id.*
5. PROOF OF MARRIAGE IN FACT is in contradistinction to proof inferable from circumstances. *State v. Hodgkins*, 742.
6. MARRIAGE IN FACT, IN A CRIMINAL PROSECUTION FOR ADULTERY, must be proved by some person present at the ceremony, or by the production of the record, or by the confession of the prisoner. *Id.*
7. PERFORMANCE OF THE MARRIAGE CEREMONY, by one duly authorized for that purpose, is necessary to be proved in a criminal prosecution for adultery. *Id.*
8. EVIDENCE OF CIRCUMSTANCES SHOWING FATHER'S PREVIOUS ASSENT TO MARRIAGE of his minor son is admissible in an action brought by the father against the justice who solemnized the marriage for the statutory penalty, but not evidence of subsequent conduct showing that the father was pleased with the marriage. *Carskadden v. Poorman*, 145.
9. PROMISE OF MARRIAGE MAY BE IMPLIED FROM CIRCUMSTANCES, but mere attentions paid by a man to a woman, although exclusive and long continued, will not warrant such presumption. *Munson v. Hastings*, 345.

See CONFLICT OF LAWS, 4.

MARRIED WOMEN.

1. DEED OF FINE-COVERT NOT EXECUTED ACCORDING TO STATUTE can not be regarded as an agreement to convey, the specific performance of which will be decreed against her. *Carr v. Williams*, 87.
2. MISTAKE IN MARRIED WOMAN'S DEED WILL NOT BE CORRECTED as against her. *Id.*
3. CHATTEL IN THE POSSESSION OF THE TRUSTEE of a woman, is not a chose in action, but a chose in possession, and on her marriage will pass to her husband. *Miller v. Bingham*, 58.
4. PERSONAL PROPERTY, SETTLED TO THE SEPARATE USE of a married woman, is free from any right or control of her then husband; but if he dies, and she subsequently marries, the estate therein vests in such second husband upon his reducing them to possession. *Id.*
5. REQUEST OF THE PROCEEDS OF THE SALE OF LAND TO A MARRIED WOMAN, inures to the benefit of her husband. *Proctor v. Forbes*, 34.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

See NEGLIGENCE, 7-10.

MISNOMER.

See NEGOTIABLE INSTRUMENTS, 16.

MISTAKE.

See MARRIED WOMEN, 2.

MONEY HAD AND RECEIVED.

See COUNTERFEIT BILLS, 1, 2.

MONOPOLIES.

See CORPORATIONS, 7; EMINENT DOMAIN, 9.

MORTGAGES.

1. WHERE STRANGER PURCHASES AT MORTGAGE SALE, it will not be set aside for mere inadequacy of price, however gross, unless there be some unfairness at the sale, or the parties interested are surprised, without fault or negligence on their part; and in no case of this kind will it be set aside after confirmation, unless fraud can be imputed to the purchaser, which was unknown to those interested when the confirmation was made. *Littell v. Zantz*, 415.
2. BIDDINGS WILL BE OPENED ONCE, WHERE MORTGAGOR IS PURCHASER, and the debt is not discharged by the sale, if a reasonable advance is offered, together with costs and expenses, which should be deposited in court. In such case an advance of at least ten per cent., and in no case of less than two hundred dollars, will be required. *Id.*
3. PREVALENCE OF YELLOW FEVER AT TIME AND PLACE OF SALE, owing to which a large part of the population had removed, and business had been generally suspended, furnishes a good ground for setting aside the sale, and for excusing the non-attendance of the mortgagees. *Id.*

4. SALE CAN ONLY BE SET ASIDE UPON PAYMENT TO THE PURCHASER of the purchase money, of all sums laid out by him in improvements, and of a liberal allowance for all trouble, costs, and expenses incurred by him. *Id.*
5. PURCHASER CAN NOT BE CHARGED WITH RENT, where sale is set aside, unless he has actually received it. *Id.*
6. DEED ABSOLUTE UPON ITS FACE WILL NEVERTHELESS BE TREATED AS A MORTGAGE, if the circumstances attending its execution, and the subsequent conduct of the parties respecting it, indicate that it was regarded by them as collateral security for the payment of a debt. *Nichols v. Reynolds*, 238.
7. IF AN ABSOLUTE DEED BE EXECUTED BY THE GRANTOR FOR TWO PURPOSES, one legal, as to secure a pre-existing debt due the grantee, and the other fraudulent, as to defraud the grantor's creditors, and there is no evidence that the grantee had any knowledge of the fraudulent intent of the grantor, the deed will be treated as a legal and valid mortgage to secure the payment of the sum due the grantee at the time of its execution. *Id.*
8. CONVEYANCE BY A MORTGAGEE OF HIS RIGHT AND INTEREST in the mortgaged premises, is valid, even though another mortgagee, claiming by the same title, be in the actual possession of the premises, whether such conveyance is treated as an assignment of an equity of redemption, or as a technical release. *Id.*
9. MORTGAGEE PURCHASING THE PREMISES ON EXECUTION against the mortgagor, must look to the land and not to the purchase money for payment of his mortgage, under the Pennsylvania statutes; so, where the purchaser's rights depend upon an agreement constituting a "lien in the nature of a mortgage." *McLanahan v. Reeside*, 138.
10. DEED WITH CONDITION OF DEFEASANCE UPON THE BACK is but a security for money, and therefore only a mortgage; and whether the condition preceded or followed the signature, does not affect its nature. *Perkins' Lessee v. Dibble*, 97.
11. WHERE CONDITION IS NOT COMPLIED WITH AT TIME STIPULATED, but is performed afterwards, the land reverts in the grantor without the necessity of a reconveyance. *Id.*
12. MORTGAGE.—CONVEYANCE OF LAND, ACCOMPANIED BY VERBAL AGREEMENT TO RESELL the same at a certain date to the grantor or his appointee, upon repayment of the consideration therefor, constitutes a sale and not a mortgage. *King v. Kinsey*, 40.
13. UNRECORDED MORTGAGE OF A VESSEL IS INVALID, according to the statute of 1839, c. 390, unless delivery and possession accompany the mortgage. *Greeley v. Waterhouse*, 730.

See EXECUTIONS, 23; JUDICIAL SALES; NOTICE, 1, 2; REPLEVIN, 2.

MUNICIPAL CORPORATIONS.

See CORPORATIONS; HIGHWAYS, 2, 3, 5.

NECESSARIES.

See INFANCY, 4; PARENT AND CHILD, 1-4.

NEGLIGENCE.

1. CONTRIBUTORY NEGLIGENCE ON THE PART OF A PERSON INJURED by a rail-

road train bars the right to any action for the injury sustained. *Flemons v. Pontchartrain R. R. Co.*, 658.

2. **PLAINTIFF CAN NOT RECOVER FOR INJURIES SUSTAINED** by reason of his own fault or neglect. *Johnson v. Whitefield*, 721.
3. **WHERE LOSS ARISES FROM MUTUAL NEGLIGENCE**, neither party can recover at common law. *Simpson v. Hand*, 231.
4. **OWNER OF GOODS INJURED BY MUTUAL NEGLIGENCE OF CARRIER** and the master of a ship colliding with the carrier's vessel, can not recover therefor against the owners of the colliding vessel. *Id.*
5. **MASTER OF VESSEL IN MOTION COLLIDING WITH VESSEL AT ANCHOR** is bound to know that the latter can not be got out of the way so readily as his own vessel can clear it, and to take measures accordingly. *Id.*
6. **FAILURE TO KEEP SIGNAL LIGHT BURNING ON VESSEL ANCHORED** in the channel of the Delaware river at night, and to maintain a proper anchor watch on board the vessel, is such negligence as to prevent a recovery by the owner of goods carried thereon against the owners of a vessel in motion colliding with such anchored vessel, for an injury to the goods, although the master of the vessel in motion is also guilty of negligence, and the burden of proof lies on the plaintiff. *Id.*
7. **PLAINTIFF IS NOT REQUIRED TO SHOW BY EVIDENCE** that the driver of an omnibus was not in the employ of a lessee of defendant, when the action is grounded on the alleged negligence of defendant's servant, and the answer contains a general denial only. *Hart v. New Orleans etc. R. R. Co.*, 689.
8. **EMPLOYER IS LIABLE FOR THE NEGLIGENCE** with which a vehicle belonging to him was driven by a servant. *Id.*
9. **RESPONSIBILITY OF MASTER FOR SERVANT'S ACT** of negligence is not restricted to cases where the master is actually present and made no effort to prevent the act which caused the damage.
10. **SERVANT CAN NOT RECOVER OF EMPLOYER** for injuries occasioned by the negligence or misconduct of a fellow-servant. *O'Neill and Gantt, JJ., and Johnston, Ch., dissenting. Murray v. S. C. R. R. Co.*, 268.

See **BANKS AND BANKING**, 2; **EVIDENCE**, 18; **HIGHWAYS**, 5; **NOTARIES**.

NEGOTIABLE INSTRUMENTS.

1. **PROMISSORY NOTE PAYABLE TO A PARTICULAR PERSON OR "HOLDER"** is a valid promissory note, transferable by delivery, and the holder may acquire a lawful title by delivery in the same manner as if the word "bearer" had been used. *Putnam v. Crymes*, 250.
2. **BILL OR NOTE PAYABLE TO A PERSON NAMED**, or bearer, is payable to bearer, and one coming into possession of it for a valuable consideration lawfully, is not required to show any consideration between the maker and the person named. *Eddy v. Bond*, 767.
3. **MAKERS OF A PROMISSORY NOTE WHO DESCRIBE THEMSELVES** in the body of the instrument as trustees of an unincorporated association, but who sign the same in their individual capacity, are personally bound thereby. *Fogg v. Virgin*, 757.
4. **HOLDER OF NOTE PLEDGED AS COLLATERAL SECURITY** for a pre-existing debt, is not deemed a *bona fide* purchaser for value, who will be protected against equities between the original parties to such note, unless there be

- proof of some new and distinct consideration, such as giving time on the pre-existing debt, or the like. *Depeau v. Waddington*, 216.
5. EXCHANGE OF COLLATERAL SECURITIES IS SUFFICIENT CONSIDERATION to constitute the holder of a note pledged as security for a pre-existing debt a *bona fide* purchaser for value, as where, in consideration of receiving such note as security, the creditor surrenders his right to the proceeds of a bond for a larger amount previously pledged as security for the same debt, which he has delivered to the debtor for the purpose of enabling him to obtain payment of it. *Id.*
 6. DELAY OF MAKER OF NOTE PLEDGED AS COLLATERAL SECURITY in giving notice to the pledgee, after knowledge of such pledge, that no consideration was given for the note, is a circumstance to be considered by the jury in determining his liability. *Id.*
 7. INDORSEMENT UPON THE BACK OF A NOTE, prior to its delivery, by one not a party thereto, renders him liable as a joint promisor. *Nash v. Skinner*, 338.
 8. AGREEMENT THAT ONE WHO PLACES HIS NAME ON THE BACK OF A NOTE for the accommodation of the maker, shall be liable only as a second indorser, will not limit his liability to the payee as a principal. *Id.*
 9. PROMISSORY NOTE PASSING BY DELIVERY, will be presumed to have come into the possession of the holder before maturity. *Harrison v. Edwards*, 364.
 10. PAYMENTS MADE ON A PROMISSORY NOTE BEFORE MATURITY can not be offset against a *bona fide* holder for value, whose title accrued before the note became due. *Id.*
 11. WANT OF CONSIDERATION FOR A PROMISSORY NOTE is no defense in a suit thereon against a *bona fide* indorsee, without notice and before maturity. *Hascall v. Whitmore*, 738.
 12. PURCHASER OF A PROMISSORY NOTE BEFORE MATURITY, with notice of the want of consideration, from a *bona fide* indorser without notice, is entitled to all the rights of his vendor. *Id.*
 13. HOLDER OF A NOTE IS BOUND TO NOTIFY ALL PRIOR PARTIES to whom he intends to resort, of demand and non-payment. *Carter v. Bradley*, 735.
 14. FAILURE TO NOTIFY A PRIOR, WILL NOT RELEASE A SUBSEQUENT INDORSER properly notified. *Id.*
 15. SUBSEQUENT INDORSER IN ORDER TO CHARGE PRIOR PARTIES has generally a day after his own liability has become fixed to notify those who stand before him. *Id.*
 16. MISTAKE OF AN INDORSER IN A NOTICE intended to charge him, will not vitiate the same if he knew that the notice was intended for him and that the note described was the one in suit. *Id.*
 17. AGENT TO MAKE DEMAND ON A PROMISSORY NOTE is not entitled to a day before he is bound to give notice; but he may wait until the next mail. *Fish v. Jackman*, 769.
 18. NOTICE OF NON-PAYMENT SHOULD BE SENT TO THE POST-OFFICE NEAREST to the party sought to be charged, except in remote country places; in such case notification by special messenger should be made. *Id.*
 19. IN SUCH CASE, if a messenger is sent off the morning after receiving notice from holder's agent that payment had been refused, it will be a case of due diligence. *Id.*
 20. NOTICE OF NON-PAYMENT OF BILL OF EXCHANGE DEPOSITED IN THE POST

- OFFICE and addressed to the drawer at the place where the bill is dated, is not sufficient to charge him, unless that was the post-office nearest his residence, or unless the holder, upon diligent inquiry, was unable to ascertain his residence. *Foard v. Johnson*, 421.
21. PROOF OF PRIOR OR INTERMEDIATE INDORSEMENTS IS UNNECESSARY in an action by an indorsee against an indorser of a note, to entitle the note to be admitted in evidence, where such indorsements are not averred in the declaration. *Weakly v. Bell and Sterling*, 116.
 22. INDORSEMENT OF NOTE IS AN ADMISSION of the drawer's handwriting and of all prior indorsements on the note. *Id.*
 23. POSSESSION OF NOTE BY INDORSER IS PRIMA FACIE EVIDENCE that he has paid it and taken it up, as against a prior indorser, where the indorsement is in blank. *Id.*
 24. PROOF OF POSTING OF NOTICE OF DISHONOR OF NOTE to be sent by mail to an indorser, must be distinct and certain. Accordingly, where a witness deposes that he caused the notice to be sent, and that "to the best of his knowledge" the letter was put into the post-office, because he is not aware of any neglect of that kind having ever occurred in the holder's store, is insufficient. *Id.*
 25. NOTE GIVEN BY MAKER OF DISHONORED NOTE FOR SAME DEBT, payable at a future day, without any new consideration, or any agreement to extend the time or to give up the old note, or to take the new note in satisfaction of the old, does not discharge the old note or release an indorser thereon. *Id.*
 26. NOTICE OF NON-PAYMENT OF NOTE DIRECTED TO INDORSER at his place of residence, "Walnut Bottom, near Carlisle," the county town, Walnut Bottom being a well-known place in the county, is sufficient, although, unknown to the holder, there is a post-office much nearer the indorser's residence than Carlisle, at which he usually gets his letters, and although there are other persons in the county of the same name, but not residing so near to Walnut Bottom. *Id.*
 27. NOTICE TO INDORSER IS NOT INVALID BECAUSE GIVEN UPON LEGAL HOLIDAY, though the indorser would not be bound to act upon the notice until the day following. *Deblieux v. Ballard*, 684.
 28. CERTIFICATE OF NOTARY IS NOT EVIDENCE OF PROTEST in Louisiana, unless subscribed by two attesting witnesses. *Id.*
 29. NOTICE OF PROTEST WILL BIND REPRESENTATIVES of a deceased indorser, though the notice was sent to the indorser, where the notice was addressed to the indorser's late residence, which was a different town, and the notary knew nothing of his death. *Planters' Bank v. White*, 305.
 30. RENEWAL OF A NOTE PREVIOUSLY GIVEN BY THE SAME PARTIES is not a continuation of a prior obligation, but is a new, separate, and distinct contract. *Galliot v. Planters' etc. Bank*, 256.
- See AGENCY, 1; ALTERATION OF INSTRUMENTS, 1-3; BANKS AND BANKING, 2, 3; BONA FIDE PURCHASERS; CORPORATIONS, 22; LOST NOTES; NOTARIES; PARTNERSHIP, 4; PAYMENT, 1-3; PUBLIC LANDS, 6; WAGERS, 3.

NEW TRIAL.

1. NEWLY DISCOVERED EVIDENCE CONSTITUTES NO GROUND FOR A NEW TRIAL unless it would be admissible under the pleadings as they existed

prior to the rendition of the judgment, without further amendment. *Landry v. Baugnon*, 606.

2. NEW TRIAL WILL NOT BE GRANTED AFTER A JUDGMENT by default in an action to recover the amount of a debt, although it is shown that proof of payment could be made by newly discovered evidence, if it appears that the evidence would not be admissible without an answer were first filed in the action. *Id.*

See JURY AND JURORS, 5.

NOLLE PROSEQUI

See MALICIOUS PROSECUTION, 1, 2.

NON-JOINDER.

See PLEADING AND PRACTICE, 1, 2.

NONSUIT.

See PLEADING AND PRACTICE, 16.

NOTARIES.

NOTARY IS PERSONALLY LIABLE FOR NEGLIGENCE to comply with the law in recording his protest and notice, whereby the indorsers of a note delivered to him for protest were discharged. *Hyde v. Planters' Bank*, 621.

See NEGOTIABLE INSTRUMENTS, 23.

NOTICE.

1. RECORD OF ABSOLUTE DEED IS NOT NOTICE TO CREDITORS of the grantee subsequently obtaining judgment, of an agreement not referred to in the deed, but executed between the grantor and grantee on the same day and recorded at the same time in the same book, that certain notes given as security for the purchase money, are to be considered a lien upon the premises in the nature of a mortgage. *McLanahan v. Reside*, 136.
2. AGREEMENT IN NATURE OF MORTGAGE NEED NOT BE RECORDED IN MORTGAGE BOOK, it seems, under the Pennsylvania recording act, but may be recorded in the book of deeds, the keeping of separate books being merely for the recorder's convenience. *Id.*
3. NOTICE BY ONE CONTRACTING PARTY OF TIME AND PLACE when he will proceed to perform the contract need not be in writing. *Bishops v. McNary*, 592.
4. NOTICE TO ONE OF TWO JOINT CONTRACTING PARTIES of the time and place when the other party will proceed to perform the contract, is sufficient. *Id.*
5. DEED FILED FOR RECORD IS DEEMED TO BE RECORDED from the time of its delivery to the recorder. *Nichols v. Reynolds*, 238.

See CORPORATIONS, 19; NEGOTIABLE INSTRUMENTS; PARTNERSHIP, 1 3, 7; PLEADING AND PRACTICE, 10; PRE-EMPTION, 2; WAGNERS, 7.

NOVATION.

See NEGOTIABLE INSTRUMENTS, 30.

NUISANCE.

See INJUNCTIONS.

ORDINANCES.

See CORPORATIONS, 8, 9, 12-17.

PARENT AND CHILD.

1. FATHER IS LIABLE FOR NECESSARIES FURNISHED HIS MINOR SON only upon an express promise or upon proof of circumstances from which a promise may be implied. *Hunt v. Thompson*, 533.
2. INADEQUATE PROVISION BY FATHER FOR CHILD'S NECESSITIES is not sufficient of itself to warrant the implication of a promise by the father to pay others for supplying the deficiency, particularly where the child is living at home. *Id.*
3. FATHER IS NOT LIABLE FOR CLOTHING FURNISHED TO SON ABSENT FROM HOME ON A VISIT, where the son was provided with sufficient apparel on leaving home, but has prolonged his visit until his clothes have become considerably worn, and some of them outgrown, there being no evidence that the prolonged absence was at the father's instance, or that he expressly authorized the additional clothing to be furnished. *Id.*
4. PARTY FURNISHING NECESSARIES TO SON VOLUNTARILY ABSENT from his father's house, without the father's consent, must look to the son, and not to the father, for payment, although he is not aware that the son is absent against his father's will. *Id.*
5. IN CHASTISING CHILDREN, PARENT MUST BE CAREFUL not to exceed the bounds of moderation, and inflict cruel and merciless punishment; if he does so, he is a trespasser. *Johnson v. State*, 322.
6. WHAT IS AN EXCESS OF PUNISHMENT, is a question of fact for the jury. *Id.*
7. CHARGE MAKING WHAT CONSTITUTES EXCESS OF PUNISHMENT a legal conclusion, instead of a question of fact, is erroneous. *Id.*
8. PURCHASE OF LAND BY A FATHER IN SON'S NAME is *prima facie* an advancement, but only to the extent of the sum actually paid by the father without regard to any subsequent rise in the value of the land. *Phillips v. Gregg*, 158.

PARTITION.

WARRANTY OF TITLE IS IMPLIED IN PARTITION DEED between tenants in common taking by descent in Pennsylvania, and one of such tenants is not a competent witness for another in ejectment thereafter brought by the latter to recover his share of the land. *Patterson v. Lanning*, 154.

PARTNERSHIP.

1. SERVICE OF A CITATION UPON ONE PARTNER, during the existence of the partnership, is a service upon all. *Gaumné v. Alin's Ex'r*, 604.
2. SERVICE OF CITATION AFTER DISSOLUTION of a partnership, does not bind the partners who are not served personally, nor will the fact that the partner served had been given a general power to settle the partnership accounts, render the service upon him valid as to the others. *Id.*
3. JUDGMENT AGAINST A PARTNER WHO WAS NOT PERSONALLY SERVED with process in an action brought after dissolution of the partnership, is void. *Id.*

4. NOTE ASSIGNED BY ONE MEMBER OF A PARTNERSHIP does not pass such an interest in it that the assignee can set it off in a suit on a bill single executed by himself to the assignor, who assigned it after maturity to the plaintiff. *McIntire v. McLaurin*, 300.
5. PARTNER AUTHORIZED TO SETTLE AND ADJUST the copartnership affairs, can not make new contracts, or create new liabilities, as by giving promissory notes binding on the firm. *Perrin v. Keene*, 759.
6. PARTNER CAN NOT BIND THE FIRM AFTER DISSOLUTION by his individual act in the partnership name, without express authority for that purpose. *Galliot v. Planters' etc. Bank*, 256.
7. PUBLICATION OF NOTICE OF DISSOLUTION OF COPARTNERSHIP in a newspaper is sufficient notice of such dissolution, to one taking a promissory note upon the faith of the firm's subsequent indorsement. *Id.*
8. AFTER DISSOLUTION PARTNER CAN NOT BIND FIRM by an acknowledgment of a debt, whether the statute of limitations has operated to bar it or not. *Muss v. Donelson*, 309.

PAWNS.

See BAILMENTS, 1.

PAYMENT.

1. BY TAKING NEGOTIABLE PROMISSORY NOTE FOR DEBT DUE ON ACCOUNT, the debt is, in Maine, considered as paid, and the contract extinguished. The note, in such case, is evidence of a new contract, unless the contrary appears, and must be a new cause of action. *Newell v. Hussey*, 717.
2. PROMISSORY NOTE GIVEN IN SETTLEMENT of an account, is only *prima facie* evidence of a discharge, and is open to explanation. *Perrin v. Keene*, 759.
3. ACCEPTANCE OF A NOTE ON ACCOUNT OF A PRIOR DEBT, is *prima facie* a satisfaction thereof. This result, however, will not follow when the note is lost or destroyed. *Lasell v. Lasell*, 352.
4. EVIDENCE OF PAYMENT of a debt is not admissible unless payment is specially pleaded. *Landry v. Baugnon*, 606.
5. PAYMENT BY ONE OF SEVERAL JOINT DEBTORS operates in favor of all. *Cook v. Field*, 436.

See COUNTERFEIT BILLS, 1, 2.

PENAL STATUTES.

See CONFLICT OF LAWS, 5; STATUTES, 4, 7, 10, 11.

PLEADING AND PRACTICE.

1. OBJECTION THAT ALL THE MEMBERS OF AN UNINCORPORATED ASSOCIATION are not joined in an action on a promissory note given for its benefit, must be by plea in abatement. *Fogg v. Virgin*, 757.
2. NON-JOINDER OF A JOINT PROMISOR, in an action of assumpsit, is only matter of abatement, and can not be taken advantage of under the general issue. *Nash v. Skinner*, 338.
3. ONE WHO WOULD HOLD BANK LIABLE FOR PENAL DAMAGES, given by statute for neglect to make payment in specie, on demand or within the time limited, must distinctly claim such damages in his declaration. *Palmer v. York Bank*, 710.

4. **DECLARATION IN PENAL ACTION SHOULD ALLEGE** that the facts charged are against the form of the statute upon which the action is based. *Id.*
5. **IN PLEADING CITIZENSHIP**, an averment that defendant is a citizen of the state is sufficient. *State v. Harris*, 460.
6. **DEFENDANT CAN NOT AVAIL HIMSELF OF AN OBJECTION TO THE DECLARATION** in an action of trespass to try title, after he has pleaded "not guilty." *Ware v. Bradford*, 427.
7. **PLEA OF NIL DEBIT TO DEBT ON BOND**, where the bond is the gist of the action and the recovery is of a sum in numero, is bad; otherwise, where the bond is merely inducement to the action. *Davis v. Burton*, 511.
8. **PLEA OF NIL DEBIT TO DEBT ON SHERIFF'S BOND** is bad. *Id.*
9. **OFFER OF EVIDENCE SHOULD SPECIFY** the purpose for which it is offered. *Carekadden v. Poorman*, 145.
10. **OBJECTION TO PROOF OF SERVICE OF NOTICE** required by law in an action for a penalty for unlawfully marrying the plaintiff's minor child, that the copy served was not a true copy because it omitted the word "one" in the expression "twenty-one years," is too refined. *Id.*
11. **IMPROPER ADMISSION OF RECORD COPY OF INSTRUMENT**, the original of which is in the possession of the party offering it, is cured by the subsequent production of the original. *Hart v. Gregg*, 166.
12. **REFUSAL OF DEFENDANT'S MOTION FOR LEAVE TO WITHDRAW PLEA** of the statute of limitations, where such motion is not made until the jury has been partly sworn, and if granted would give the defendant the privilege of opening the case, is not an improper exercise of the discretion of the court. *Sanders v. Johnson*, 564.
13. **EXCLUSION OF WITNESSES FROM COURT-ROOM** IS DISCRETIONARY with the court, and where the defendant, before examining his witnesses, moves to exclude the plaintiff's witnesses, who have not yet testified, but does not include his own witnesses, a denial of such motion is not improper. *Id.*
14. **IMPROPER SUPPRESSION OF DEPOSITION** IS WAIVED by introducing another deposition of the same witness containing the same testimony. *Id.*
15. **QUESTION OF FACT UPON WHICH THERE IS A SPARK OF EVIDENCE** must be submitted to the jury. *Bank of Pittsburgh v. Whitehead*, 186.
16. **INSTRUCTION TO FIND AS IN CASE OF NONSUIT** is in the nature of a demurrer to evidence, which admits the evidence, concedes its truth, and is predicated upon it. *Bishops v. McNary*, 592.
17. **INCOMPETENCY OF WITNESS FROM INTEREST** IS NOT GROUND OF INSTRUCTION to find as in case of nonsuit, but the objection should be taken by a distinct motion to exclude the evidence. *Id.*
18. **INSTRUCTION THAT PERSONALTY IS LIABLE BEFORE REALTY** in payment of a charge in such a case does not tend to mislead the jury, and forms no ground for complaint. *Guthrie v. Owen*, 311.
19. **REFUSAL OF INSTRUCTION SO AMBIGUOUSLY WORDED** that it might be understood by an unprofessional man of ordinary capacity in a sense that would make it erroneous, is not assignable as error. *Summer v. State*, 561.
20. **COURT NEED NOT CHARGE UPON POINT NOT ARISING** upon the evidence. *Harvey v. Thomas*, 141.
21. **ABSENCE OF INSTRUCTIONS NOT SPECIFICALLY PRAYED** for is not error. *Churchman v. Smith*, 211.

22. **EXPRESSION OF OPINION ON THE STATE OF FACTS** by the lower court is not matter of legal exception. *Phillips v. Kingfield*, 760.
22. **GENERAL ASSIGNMENT OF ERROR IN CHARGE OF COURT**, without specifying the particular points in which it is erroneous, will be disregarded. *Carskadden v. Poorman*, 145.
24. **NEW EVIDENCE CAN NOT BE RECEIVED IN APPELLATE COURT**, it seems, ever by the consent of the parties. *Lane v. Dorman*, 543.
- See **AMENDMENTS; AUDITA QUERELA; CERTIORARI; CONTINUANCE; CORPORATIONS**, 8, 26, 27; **COSTS; CRIMINAL LAW; EJECTMENT**, 2, 3; **EMINENT DOMAIN**, 7; **EQUITY**, 4; **ESTOPPEL; EVIDENCE; INTERPLEADER; JUSTICES OF THE PEACE; MALICIOUS PROSECUTION**, 1, 3; **NEW TRIAL; QUO WARRANTO**.

PLEDGE.

See **BAILMENTS**, 1

PRE-EMPTION.

1. **PERSON HAVING ACQUIRED INCHOATE RIGHT OF PRE-EMPTION** to a tract of land under the act of May 29, 1830, by settlement and cultivation, may, upon making proof and paying the purchase money within one year, compel a conveyance by a purchaser thereof by virtue of a Vincennes certificate, under the act of May 11, 1820, who entered and purchased the land after such inchoate right accrued, but before the pre-emption price was paid, and may enjoin such purchaser from recovering the land. *Bruce v. Manlove*, 551.
2. **OPEN AND NOTORIOUS POSSESSION OF SETTLER ON PUBLIC LAND**, under the act of May 29, 1830, is notice to all the world of his equitable right of pre-emption. *Id.*
3. **VALIDITY OF CERTIFICATE OF PRE-EMPTION MAY BE IMPEACHED** in ejectment brought by the pre-emptor against a party in possession under the authority of the United States, by evidence of fraud and collusion between the pre-emptor and the officers granting the certificate, the latter knowing the land not to be subject to pre-emption. *Jamison v. Benablen*, 534.

See **PUBLIC LANDS**, 1, 5.

PREFERENCES.

See **ASSIGNMENT FOR BENEFIT OF CREDITORS**, 1.

PRESCRIPTION.

See **ADVERSE POSSESSION**, 4.

PRINCIPAL AND AGENT.

See **AGENCY**.

PRIVIES.

GRANTOR AND GRANTEE ARE PRIVIES IN ESTATE only as to acts done or suffered by the former before conveyance. *Blackmore v. Gregg*, 171.

See **ADVERSE POSSESSION**, 9; **COMMON CARRIERS**.

PROBABLE CAUSE.

See **MALICIOUS PROSECUTION**.

PROCESS.

1. **APPOINTMENT OF A SPECIAL OFFICER TO SERVE PROCESS** is a judicial act, and can be exercised only by the authority signing the process. *Ross v. Fuller*, 342.
 2. **DEPUTATION OF AUTHORITY TO SERVE A WRIT** signed by a justice of the peace in blank, and afterwards filled up by a stranger, confers no authority upon the person therein apparently authorized. *Id.*
 3. **RADICAL DEFECT IN THE APPOINTMENT OF THE PERSON** who serves a writ, is not cured by judgment by default. *Id.*
- See **ATTACHMENTS; EXECUTIONS; PARTNERSHIP**, 1-3; **PLEADING AND PRACTICE**, 10.

PROMISE OF MARRIAGE.

See **MARRIAGE AND DIVORCE**.

PROMISSORY NOTES.

See **NEGOTIABLE INSTRUMENTS**.

PUBLIC LANDS.

1. **REGISTER AND RECEIVER HAVE NO JURISDICTION** to grant titles by pre-emption. *Guidry v. Woods*, 677.
2. **COMMISSIONER OF THE GENERAL LAND OFFICE HAS AUTHORITY**, under the supervision of the secretary of the treasury, to determine the construction of acts of congress relative to the public domain, and if it appear that the register and receiver have issued a certificate of purchase to lands the sale or disposal of which is unauthorized by law, may revoke or annul it. *Id.*
3. **RECORDS OF THE GENERAL LAND OFFICE** and deposition of the commissioner are admissible to prove the cancellation by the commissioner of the certificate of entry and purchase issued by the register and receiver to land not subject to pre-emption. *Id.*
4. **CERTIFICATE OF PURCHASE OF PUBLIC LANDS** issued by the register and receiver does not constitute evidence of title. *Id.*
5. **SUCH CERTIFICATE IS EVIDENCE** that the applicant was then in possession, and that he had cultivated the land in the time and manner required by law. *Id.*
6. **SALE OF IMPROVEMENTS ERECTED ON PUBLIC LAND** of the United States forms a good consideration for a promissory note given for their price. *Ratcliff v. Bridger*, 683.
7. **NO TITLE OR LIEN OR PRIVILEGE UPON THE LAND** is transferred by or implied in such sale independent of the rights conferred by the laws of the United States. *Id.*
8. **FENCE BUILT ON GOVERNMENT LAND BY MISTAKE** by an adjoining proprietor becomes part of the freehold, and passes to a subsequent purchaser of the land, and it is trespass for the party erecting it to remove it. *Seymour v. Watson*, 556.

See **PRE-EMPTION**.

PUIS DARREIN CONTINUANCE.

See **COSTS**.

QUANTUM MERUIT.

1. **QUANTUM MERUIT MAY BE RECOVERED** for work done under a special contract upon the rescission of the same without any fault on the part of the plaintiff. *Blood v. Enos*, 363.
2. **MEASURE OF DAMAGES, IN SUCH CASE,** is the value of the labor at the price agreed upon, less whatever damage the defendant has suffered by reason of the failure to complete the contract. *Id.*

QUO WARRANTO.

1. **QUO WARRANTO, OWNERSHIP OF LAND, HOW PLEADED.**—Where the ownership of real estate is by law a prerequisite to the exercise of a franchise, upon *quo warranto*, the party exercising the franchise must in his plea describe the real estate of which he is owner, and how he has derived title thereto, and exhibit the deeds and records by which his ownership is evidenced. *State v. Harris*, 460.
2. **IDEM.—OWNERSHIP OF STOCK,** where a prerequisite to the exercise of a franchise, must be pleaded, so as to show that the stock was originally awarded after a compliance with the requirements of law, and if acquired by the defendant by transfer, the transfer must be set out; and the title deeds and records through which the defendant's title thereto has been acquired, must be exhibited, or some legal excuse for their non-production must be made. *Id.*
3. **IDEM.—IN PLEADING AN ELECTION TO THE OFFICE OF DIRECTOR,** by the stockholders of a corporation, defendant must show that the election was held agreeably to law and in conformity with and in pursuance of the ordinances and regulations of the governing board of the corporation, and that at such election he received a majority of the legal votes cast; if his claim is by virtue of an election by the board of directors, to supply a vacancy therein, he must show the existence of a board competent to elect, and that a vacancy existed therein, and how such vacancy arose, and his subsequent election. *Id.*
4. **DEFENDANT IN QUO WARRANTO NEED ONLY SHOW A PRIMA FACIE LEGAL RIGHT** to his enjoyment of the franchise; that if his pleading show an election by electors acting under color of legal right, it is sufficient; and that the electors were not possessed of the proper qualifications must be pleaded in avoidance by the state. *Id.*
5. **WRIT OF QUO WARRANTO IS A WRIT ISSUABLE** by the state at will and of right, and is a demand made by it upon an individual, to show by what right he exercises a franchise, which can not lawfully be exercised, except by virtue of some grant or authority emanating from it. *Id.*
6. **ON QUO WARRANTO, THE BURDEN IS UPON THE DEFENDANT** of showing such facts as invest him with a complete legal title to the franchise in question. *Id.*
7. **IDEM.—UPON A QUO WARRANTO TO THE PRESIDENT OF A CORPORATION,** requiring him to show his title to that office, he must show the existence of the corporation, that he is possessed of the qualifications required by law of the incumbent of the office of president thereof, and that he is the president. *Id.*
8. **PROCEEDING BY QUO WARRANTO IS A REMEDY** by which the state may at pleasure require any citizen exercising a public franchise or au-

thority which he can not legally exercise without some grant or authority from it to show the warrant under which he acts, in order that there may be a determination of his legal right. *State v. Evans*, 468.

9. **OBJECT AND EFFECT OF THE PROCEEDING** by *quo warranto* is either to oust the party defendant of the franchise, if he fails to show in himself a complete legal right to its exercise; or if the franchise has been legally granted, but has been forfeited by the defendant or those under whom he claims, then to seize it into the hands of the state. *Id.*
10. **IDEM.**—WHERE A PERSON IS LEGALLY ENTITLED TO THE EXERCISE OF A FRANCHISE, he can not by *quo warranto* be prohibited or restrained from the doing of any particular act or thing, the right of doing which is claimed by virtue of such office or franchise, and constitutes only an integral part of the rights, powers, and privileges incident thereto. Thus a judge legally elected, can not be prohibited by such a proceeding from taking cognizance of and adjudicating any suit or proceeding instituted and pending for adjudication in any court which he is authorized to hold, although such court may not legally possess jurisdiction over the matter. *Id.*

RAILROADS.

See EMINENT DOMAIN, 3, 5, 9; HIGHWAYS, 8.

RECORDING.

See MORTGAGES, 13; NOTICE, 2, 5.

REDEMPTION.

See EXEMPTIONS,

REGISTERS AND RECEIVERS.

See PUBLIC LANDS, 1-5.

RENT.

See LANDLORD AND TENANT; CO-TENANCY, 2, 6, 14; MORTGAGES, 5.

REPEAL.

See STATUTES, 5, 6, 8, 9.

REPLEVIN.

1. **TRESPASSER SOWING WHEAT ON LAND CAN NOT MAINTAIN REPLEVIN** against the true owner, who enters into actual possession and cuts the grain. Therefore, in replevin brought for cutting grain sown by the plaintiff on land in his possession, evidence is admissible on the part of the defendant to show that he was the real owner of the land, and as such entered into possession and took the crop, and that the plaintiff was merely a trespasser. *Elliott v. Powell*, 200.
2. **TITLE TO REALTY MAY BE TRIED INCIDENTALLY IN REPLEVIN** or other transitory action. *Id.*
3. **MORTGAGEE OF CHATTEL CAN NOT MAINTAIN REPLEVIN AGAINST SHERIFF** seizing the same on *f. fa.* against the mortgagor while in the latter's possession, and threatening to sell in disregard of the mortgagee's title.

Some tortious act is necessary to constitute the sheriff a trespasser *ab initio* in such a case, and a mere threat to sell the property absolutely is not sufficient. *Fugate v. Clarkson*, 589.

REPUTATION.

See EVIDENCE, 9, 18.

RES ADJUDICATA.

See JUDGMENTS, 1, 2, 4, 7; JUSTICES OF THE PEACE, 6.

RESCISSION OF CONTRACTS.

1. COURT OF CHANCERY WILL RESCIND CONTRACT FOR PURCHASE OF LAND, where the vendor represented to the vendee that a field of forty acres of rich bottom land on an adjoining tract was included in the purchase, although such vendor had been previously informed by the owner of such tract, that he had run out the line between them with a pocket compass, and had ascertained that the field belonged to him. *Camp v. Camp*, 423.
2. CONTRACT FOR THE PERFORMANCE OF WORK AND LABOR MAY BE RESCINDED by a naked agreement to that effect. *Blood v. Enos*, 363.
3. RESCISSION OF A CONTRACT IS A QUESTION OF FACT for the jury. *Id.*
4. PURCHASER OF GOODS WITH WARRANTY CAN NOT RETURN the same and recover the price, on breach of the warranty, but must sue upon his warranty, if the vendor had no knowledge of the unsoundness, and does not consent to take the article back, and the contract itself reserves no right to return it. *Kass v. John*, 148.
5. RETURN OF ARTICLE BY PURCHASER FOR PURPOSE OF REPAIR, where it is defective, is not effective for the purpose of rescission, even though the vendor neglects to repair the article. *Id.*

See QUANTUM MERUIT, 1.

RIPARIAN RIGHTS.

See WATERCOURSES.

SALES.

1. SALE OF PERSONAL PROPERTY IS COMPLETE, and no subsequent formal delivery thereof is necessary, where, from the date of the bill of sale, the property continued to be on land, or in buildings, in the exclusive possession and control of the vendee. *Nichols v. Patten*, 713.
2. CHANGE OF POSSESSION OF PERSONAL PROPERTY upon a sale thereof is necessary, in order to protect the rights of the vendee. *Wilson v. Hooper*, 366.
3. POSSESSION IS SUFFICIENTLY CHANGED upon the sale of a farm with the personal property thereon, upon which neither of the parties reside, if the vendee records his deed, enters upon the premises, and assumes the entire control thereof. *Id.*
4. VENDOR ASSISTING A VENDEE TO THRESH GRAIN in a barn, being part of the property conveyed, is not such a retention of possession as will render a sale fraudulent and void as to the creditors of the vendor. *Id.*
5. VENDEE WHO ACCEPTS A CONSIGNMENT OF GOODS UPON WHICH THE PRICES ARE MARKED, is presumed to have taken them at the vendor's prices as

marked, or as stated in an accompanying invoice, unless it should appear from a custom with which both were acquainted, or from the course of previous dealing between the parties, that the vendee had a right to reduce the prices according to the estimated value of the goods at the place of consignment. *Mitchell v. McBes*, 284.

See **AGENCY**, 1, 3; **BAILMENT**, 2; **CO-TENANCY**, 9, 10; **RESCISSIÃO OF CONTRACTS**, 4, 5.

SAVINGS BANKS.

See **BANKS AND BANKING**, 1.

SEAL.

WHERE SEAL OR SCRAWL IS NOT AFFIXED TO SOME OF THE NAMES of the obligors in a bond which indicates upon its face an intention to seal it, it will be presumed that those obligors against whose names no seals appear, adopted the seals affixed by the others, and all will be bound, but the presumption may be rebutted by plea and proof. *Davis v. Burton*, 511.

SEAWORTHINESS.

See **INSURANCE—MARINE**, 7, 8.

SEPARATE PROPERTY.

See **MARRIED WOMEN**, 4.

SHERIFFS.

1. SHERIFF IS RESPONSIBLE FOR ALL OFFICIAL ACTS OF HIS DEPUTY, but not for neglect of any duty which the law does not require him officially to perform. *Harrington v. Fuller*, 719.
2. SHERIFF REMAINS LIABLE FOR PROPERTY WRONGFULLY TAKEN BY HIS DEPUTY, and sold, so long as the property in the goods taken or the money received from their sale remains unchanged. But when the owner of the goods sues the deputy for the trespass, recovers judgment, and takes out execution against him, the property in them becomes changed, and the deputy no longer holds in his official capacity, but in his own absolute right, and the sheriff is no longer responsible. *Id.*

See **ATTACHMENTS**; **EXECUTIONS**; **PLEADING AND PRACTICE**, 8; **REPLEVIN**, 3.

SHERIFFS' DEEDS.

See **EXECUTIONS**, 16, 22.

SHERIFFS' SALES.

See **EXECUTIONS**, 7, 19, 20, 21.

SHIPPING.

See **BOTTOMRY**; **INSURANCE—MARINE**; **MORTGAGES**, 13; **NEGLIGENCE**, 4-6.

SLANDER.

1. EVIDENCE, IN ACTION FOR SLANDER, of prior reports charging the plaintiff with the same crime imputed to him by the defendant, without any offer to explain their extent or effect upon the plaintiff's character, is inad-

missile in mitigation of damages under a plea of justification. *Sanders v. Johnson*, 564.

2. EVIDENCE OF CIRCUMSTANCES CREATING SUSPICION OF PLAINTIFF'S GUILT of the offense imputed, but not proving such guilt, is not to be considered in mitigation of damages in an action for slander for charging the plaintiff with a crime, to which justification is pleaded, where there is no proof of such glaring misconduct by the plaintiff as to cause the defendant to believe the charge and his plea of justification to be true. *Id.*
3. DAMAGES MUST BE PALPABLY EXCESSIVE IN SLANDER, to warrant setting aside the verdict, where the charge is of an infamous offense, and has been publicly and repeatedly made, and justification pleaded with little or no evidence to support it. *Id.*
4. WORDS NEED NOT BE NECESSARILY DEFAMATORY in order to be actionable. *Bentley v. Reynolds*, 251.
5. FALSE ASSERTIONS PRODUCTIVE OF ACTUAL DAMAGE to the person concerning whom they are uttered, will enable him to sustain an action of slander, provided, that the damage of which he complains was not the result of any acts of others, to whom such words were spoken, of so unlawful a character, that an action for relief might have been sustained against such persons themselves. *Id.*
6. ACTION MAY BE MAINTAINED FOR FALSE AND MALICIOUS ASSERTIONS by which creditors of plaintiff were induced to cause attachments to be levied against his property, which otherwise might not have been levied, and it is not material whether the words were spoken in relation to any particular trade or employment of the plaintiff. *Id.*

SPECIFIC PERFORMANCE.

See MARRIED WOMEN, 2.

STAKEHOLDER.

See WAGERS, 2, 6-8.

STATUTES.

1. GENERAL WORDS IN STATUTE MUST RECEIVE GENERAL CONSTRUCTION, unless there be something in it to restrain them. *Jones v. Jones*, 723.
2. RETROSPECTIVE OPERATION WILL NOT BE GIVEN TO STATUTE unless the intention to give it such operation is clearly expressed. *Oriental Bank v. Freeze*, 701.
3. LEGISLATURE MAY PASS LAWS THAT ACT RETROSPECTIVELY where they operate upon the remedies afforded by law for the protection of rights of property, or for the enforcement of the obligation of contracts, not upon those rights and obligations themselves. *Id.*
4. WHERE STATUTE GIVES PARTY RIGHT TO RECOVER JUDGMENT IN NATURE OF PENALTY, for a sum larger than is justly due, the right to the amount that may be so recovered does not become vested until after judgment. *Id.*
5. ACT PROVIDING FOR THE HOLDING OF SPECIAL TERMS of courts for the trial of criminal causes, is not repealed by a subsequent act authorizing such courts, when unable at the regular terms to dispose of all the business pending therein, to hold special terms to be devoted exclusively to the civil and chancery docket. Such acts are entirely consistent with each other, and may both operate together. *State v. Hughes*, 411.

6. AFTER REPEAL OF STATUTE CONFERRING JURISDICTION on a particular tribunal in road matters, its confirmation of a viewer's report in favor of a road previously petitioned for is void. *North Canal St. Road*, 185.
 7. STATUTES IN RELATION TO THE SAME OFFENSE must be taken together and construed as if the matters to which they relate were embraced in a single statute. *State v. Wilber*, 245.
 8. REPEAL OF REPEALING STATUTE revives the original statute. *Collins v. Smith*, 228.
 9. EXPIRATION OF REPEALING STATUTE BY ITS OWN LIMITATION revives the statute repealed and supplied. Therefore the Pennsylvania act of March 19, 1810, relating to unincorporated banks, was revived by the expiration of the repealing act of March 21, 1814. *Id.*
 10. STATUTE GIVING FOURFOLD INTEREST BY WAY OF DAMAGES IS PENAL in its character; but where the damages are given to the party injured, who seeks recovery of a just debt to which the increased damages are made an incident, such action is not properly to be regarded as a penal one. *Palmer v. York Bank*, 710.
 11. WHERE STATUTE GIVES PENAL DAMAGES TO PARTY INJURED, in a case where he had before a remedy at common law, if he claim such damages, he must do so by a reference to the statute. *Id.*
- See CONFLICT OF LAWS; CONSTITUTIONAL LAW; CORPORATIONS, 5, 6, 13, 14; CRIMINAL LAW, 2, 3; EMINENT DOMAIN, 2, 6; EVIDENCE, 1, 2; GAMING.

STATUTE OF FRAUDS.

PROMISE TO PAY ONE FOR WORK PERFORMED FOR ANOTHER, if such other would not, is within the statute of frauds and must be in writing. *Aldrich v. Jewell*, 330.

STATUTE OF LIMITATIONS.

1. STATUTE OF LIMITATIONS BEGINS TO RUN WHEN THE CAUSE OF ACTION ACCRUES, not from the time the knowledge of that fact comes to the plaintiff. *Fee v. Fee*, 103.
 2. FRAUDULENT CONCEALMENT WILL NOT STOP THE RUNNING OF THE STATUTE, though the plaintiff is thereby prevented from knowing that his cause of action accrued; the relief in such a case would be in equity. *Id.*
 3. DISABILITY SAVING HEIR FROM OPERATION OF STATUTE OF LIMITATIONS is no protection to co-heirs. *Moore v. Armstrong*, 63.
 4. PARTY SAVED CAN NOT RECOVER HIS ESTATE ON JOINT DEMISE with those whose rights are barred; his recovery must be on a separate demise. *Id.*
 5. TERM "BEYOND SEAS," IN THE STATUTE OF LIMITATIONS, means without the state. *Feld v. Dickinson*, 458.
- See ADVERSE POSSESSION, 10; PARTNERSHIP, 8; PLEADING AND PRACTICE, 12.

STOCK.

See CORPORATIONS, 17, 23, 24.

STREETS.

See CORPORATIONS, 10, 11, 18; HIGHWAYS, 2, 3.

SUBROGATION.

See CONTRIBUTION.

SUBSCRIPTION.

See CONTRACTS; CORPORATIONS, 4, 5.

SUOCESSION.

See ALIENS, 1, 2.

SURETYSHIP.

SURETY IS NOT RELEASED BY MERE VERBAL ASSENT TO INDULGENCE to the principal for a specified time, without the surety's consent, there being no consideration or new security taken for such assent. *Brinagar v. Phillips*, 575.

See CONTRIBUTION.

TAX SALES.

1. TO VALIDATE TAX SALE, LAND MUST BE PROPERLY ENTERED on tax duplicate. *Perkins' Lessee v. Dibble*, 97.
2. TAX DUPLICATE INSUFFICIENT, WHEN.—A tax duplicate describing the land as being in "range 3, township 13, section 1, lots 8 and 9 N. part, one hundred acres," without specifying the quantity of land in each lot, is not sufficient under the act of February 3, 1835, and a tax sale under it is void. *Id.*

TENANTS IN COMMON.

See CO-TENANCY.

TESTAMENTARY GUARDIANS.

See GUARDIAN AND WARD.

TRESPASS.

1. IN TRESPASS ALL ARE LIABLE WHO PARTICIPATE in the wrongful act, either by aiding in, or advising, or assenting to it. *Ross v. Fuller*, 342.
2. INDORSE OF A NON-NEGOTIABLE NOTE IS NOT LIABLE AS A TRESPASSER for the seizure of property under a void attachment issued in a proceeding brought thereon in his name as nominal plaintiff. *Id.*

See CO-TENANCY, 8; REPLEVIN, 1, 3.

TROVER.

OWNER OF LAND OUT OF POSSESSION MAY MAINTAIN TROVER FOR THINGS out thereon by one not in actual possession of the premises. *Wright v. Guter*, 108.

See CO-TENANCY, 8.

TRUSTEE PROCESS.

See GARNISHMENT.

TRUSTS.

1. POSSESSION OF A TRUSTEE IS CONSIDERED as that of the beneficiary. *Miller v. Bingham*, 58.
2. ADVERSE POSSESSION, BETWEEN THE TRUSTEE AND CESTUIS QUE TRUST, can not exist where the trust is express. *Id.*

2. COURT OF LAW WILL NOT ENTERTAIN QUESTION OF VALIDITY OF TRUSTS, if an estate be conveyed to a grantee capable of taking the trust estate. *Miles v. Fisher*, 61.

See AGENT, 6; FRAUDULENT CONVEYANCES, 5; WILLS, 9.

USAGE

LOCAL USAGE INCONSISTENT WITH A CONTRACT made at the place where such usage prevails, is not a part of such contract, and can not be given in evidence to contradict or avoid it. *Sweet v. Jenkins*, 242.

See INSURANCE—MARINE, 2.

USURY.

See CONFLICT OF LAWS, 7.

VENDOR AND VENDEE.

See ADVERSE POSSESSION, 1; RESCISSION OF CONTRACTS.

VENUE.

See CRIMINAL LAW, 22, 23.

VERDICT.

VERDICT OF A JURY ON FACTS DIRECTLY IN ISSUE in one case, is conclusive as to such facts, in a subsequent case between the same parties. *Isaac v. Clark*, 372.

See EJECTMENT, 4, 5; EMINENT DOMAIN, 12; JUDGMENTS, 7; JURY AND JURORS, 4.

WAGERS.

1. WAGERS UPON THE RESULT OF A PENDING ELECTION are contrary to public policy, and can not be enforced. *Jeffrey v. Ficklin*, 456.
2. STAKEHOLDER OF MONEY WAGERED UPON THE RESULT OF AN ELECTION can not pay over the money lawfully, in opposition to the order of his principal; nor can he refuse to deliver up the wager if demanded before the determination of the final result of the election. *Id.*
3. NOTE GIVEN FOR A BET ON AN ELECTION IS VOID. *Russell v. Pyland*, 307.
4. MONEY WON UPON A WAGER IS NOT RECOVERABLE in Pennsylvania. Therefore, an action upon a check shown to have been given in pursuance of a bet, can not be maintained. *Edgell v. McLaughlin*, 214.
5. MONEY PAID TO THE WINNER OF WAGER, the parties being *in pari delicto*, can not be recovered back, unless made recoverable by statute. *Stacy v. Foss*, 755.
6. STAKEHOLDER OF A WAGER, WHERE THE MONEY HAS NOT BEEN PAID over to the winner, is liable to the loser, upon notice and demand, for the amount by him deposited. *Id.*
7. NOTICE TO A STAKEHOLDER BY ONE OF THE PARTIES TO A WAGER, to retain the money deposited in his hands, arrests it, and he may not afterwards pay over the money to either, whatever the determination of the event upon which depends the wager. *Schackelford v. Ward*, 435.
8. SPECIAL DEMAND ON A STAKEHOLDER IS NOT NECESSARY, before instituting suit to recover the money deposited, if he has informed the depositor that

he has paid over the money, which it is sought to recover, to the other party to the wager, in opposition to instructions previously given. *Id.*

See GAMING.

WARRANTY.

See COVENANTS, 3, 4; INSURANCE—MARINE, 8; PARTITION; RESCRIPTION OF CONTRACTS, 4.

WASTE.

See CO-TENANCY, 15.

WATERCOURSES.

1. RIPARIAN ESTATE IS ENTITLED TO THE ALLUVIAL ACCRETIONS that may be formed upon its front. *Municipality No. 3 v. Cotton Press*, 624.
2. LEGISLATURE CAN NOT DEPRIVE A RIPARIAN PROPRIETOR of his right to the future alluvion that may be deposited upon his river front. *Id.*
3. *IDEM.*—CHANGE IN CHARACTER OF PROPERTY FROM RURAL TO URBAN, effected by its incorporation as a city, does not deprive it of the right to future formed alluvion. *Id.*
4. PRINCIPLES OF THE ROMAN AND SPANISH LAWS, with respect to alluvion, explained. *Id.*
5. PRINCIPLE THAT GIVES ALLUVION TO THE RIPARIAN PROPRIETOR upon whose front it is deposited, is founded upon the consideration that his exposed situation burdening him with the risk of loss through the agency of the river, he should be allowed the benefits which its contiguity may confer, as a compensation. It in no manner depends upon the duty of keeping up levees and embankments to guard against the overflow of the river. To the same point, *Garland, J.* *Id.*
6. INTERVENTION OF A PUBLIC ROAD BETWEEN A TRACT AND A RIVER does not prevent the gain by alluvion from belonging to such tract. *Id.*
7. WHERE A PUBLIC USE EXISTS IN THE BANKS OF A RIVER, the future alluvial accretions will be subject to the same use; but the right of property therein will be vested in the same person in whom is the property in the bank; and it seems that when, by reason of the increase by accretions, any part of the original bank is no longer needed for the exercise of the use, the owners of the right of property therein will also be entitled to its occupation. *Id.*
8. RIPARIAN OWNER'S RIGHT OF EXCLUSIVE POSSESSION TO THE SHORE of a navigable stream does not extend beyond low-water mark. *Harvey v. Thomas*, 141.
9. RIPARIAN PROPRIETOR CAN NOT BE DEPRIVED OF HIS RIGHT to the natural flow of a stream by mere use or appropriation by another, except by grant or by use or occupation for such a length of time that a grant will be presumed. *Davis v. Fuller*, 334.
10. ALL PERSONS HAVE RIGHT TO TRAVEL ON ICE OVER PUBLIC RIVER, and any one who cuts a hole in the ice, in or near the traveled way on such ice, is liable for injuries sustained by those passing over said way, without fault or negligence on their part. *French v. Camp*, 723.

See DEDICATION.

WAYS.

OBSTRUCTION OF A WAY BY THE ERECTION OF A GATE THEREON, which may be opened and shut at pleasure, is not such an obstruction as will operate to extinguish the claimant's right of way, however long it may have been continued. *Barnwell v. Magrath*, 254.

WILLS.

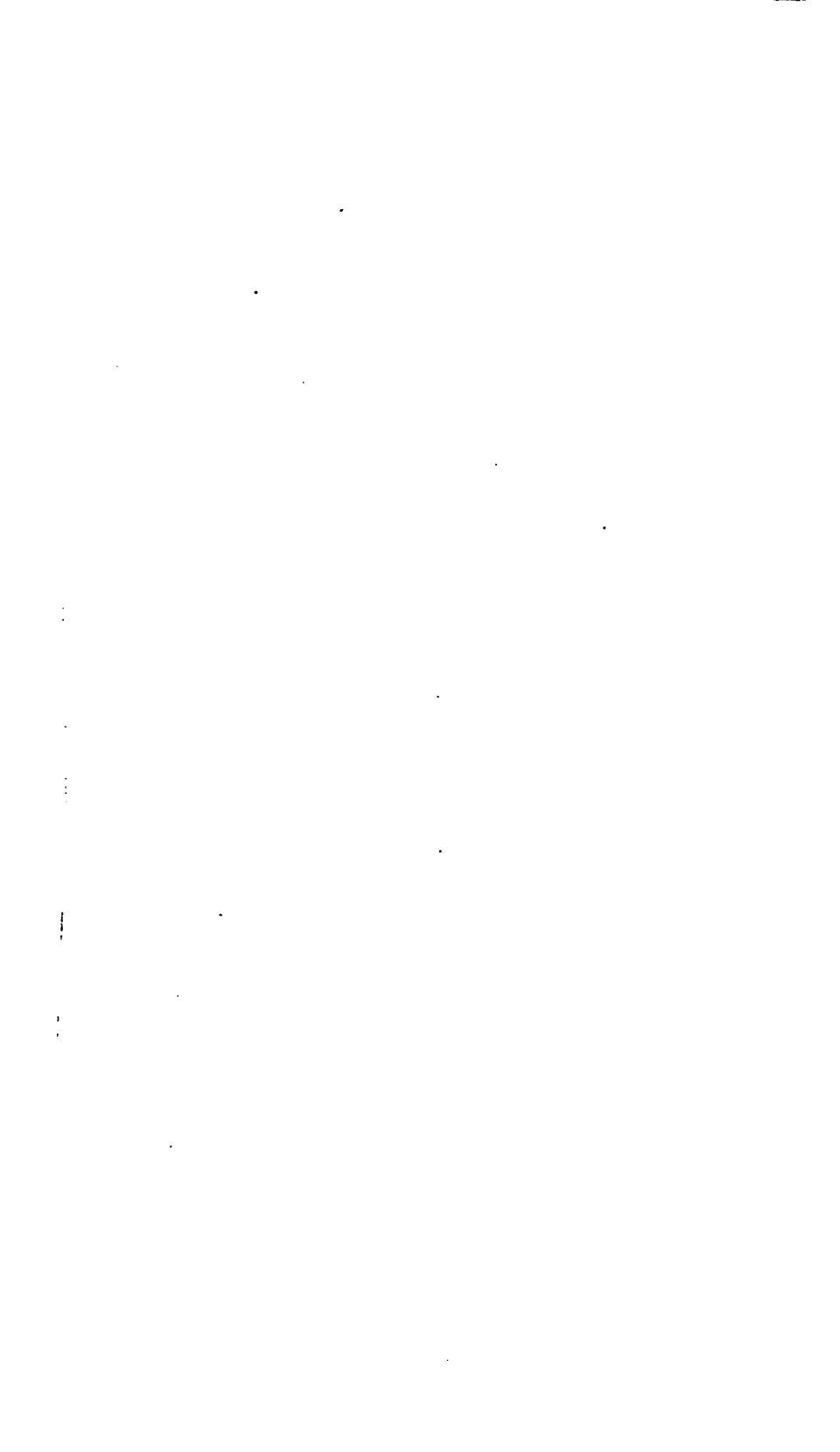
1. **UNEXECUTED WILL, HOW FAR VALID.**—Where a will is finished with the exception of the attestation clause and the clause appointing an executor, and the draughtsman leaves and does not return till the next day, when the testator was mentally incapable of finishing it, and fills in these clauses himself, it will be admitted to probate as far as the personality is concerned, it comprising within its scope all the objects of the testator's bounty, and the instrument showing that nothing in the nature of a deduction from or charge upon the bequests would have been added. *Guthrie v. Owen*, 311.
2. **WHERE LEGACIES ARE TO BE MADE FROM THE REAL AND PERSONAL PROPERTY** in such a case, they will be made from the personality as far as possible, though they will fail as to the realty. *Id.*
3. **PARTICULAR LEGACY, CONSISTING OF A SUM OF MONEY**, would, by the laws of Scotland, be considered as a simple bequest of the money, and not of any heritable property, which, if a citizen of Louisiana were the legatee, he would not be incapacitated from receiving, and such citizen could recover the amount of the legacy in the courts of Scotland, notwithstanding a deficiency in the personal estate to pay personal debts or other preferable bequests of the testator. *Duke of Richmond v. Miles's Ex'rs*, 613.
4. **LEGACY BEQUEATHED BY A CITIZEN OF LOUISIANA** to establish a free school in his native town in Scotland, will be paid to the persons authorized to receive it, and the entire estate of the testator will, if necessary, be charged with its payment. *Id.*
5. **LEGACY OF MONEY SECURED UPON REAL ESTATE** is not a heritable bond within the meaning of that term, as understood under the laws of Scotland. *Id.*
6. **PARTICULAR LEGACY CONSISTING OF A DEFINITE SUM** of money is entitled to be satisfied in preference to all others. *Id.*
7. **PARTICULAR LEGACY IS A CHARGE UPON THE ENTIRE ESTATE**, and if the heir be admitted before it is discharged, becomes a personal debt, which he is required to extinguish out of the real as well as the personal estate, and interest thereon may be collected from the day of demand. *Id.*
8. **DEVISE OF LAND TO TRUSTEES AND THEIR SUCCESSORS**, the successors to be appointed by the court of common pleas, is void as to the successors. *Miles v. Fisher*, 61.
9. **DEVISE TO TRUSTEES AND TO THE SURVIVORS** or survivor of them, to hold as joint tenants, and not as tenants in common, vests an estate for life in the survivor. *Id.*
10. **WHERE ONE HAS ELECTED TO TAKE BENEFICIAL INTEREST UNDER WILL**, and has received the same, he can not afterwards set up a claim of his own, which would defeat the operation of the will. *Weeks v. Patten*, 696.
11. **LANDS ACQUIRED BY TESTATOR AFTER EXECUTION OF HIS WILL** do not pass by a general devise therein. *Meador v. Soreby*, 432.

12. POWER IN WILL TO SELL ALL THE ESTATE OF THE TESTATOR does not authorize the executor to sell after-acquired lands. *Id.*
 13. EQUITABLE ESTATE IS GOVERNED BY SAME RULES AS PURELY LEGAL ESTATE, so far as the power to pass after-acquired lands by will is concerned. *Id.*
- See EQUITY, 2; GUARDIAN AND WARD, 2, 3; MARRIED WOMEN, 5.

WITNESSES.

1. WIFE OF PARTY JOINTLY INDICTED WITH OTHERS AS A WITNESS.—Where three parties are jointly indicted for an assault and battery, and two of them are granted a separate trial, the wife of the other is a competent witness in their favor, as her husband has no interest in the event of their trial. *Mofft v. State*, 301.
 2. REFUSING TO TESTIFY CONCERNING MATTERS TENDING TO CRIMINATE himself, is a privilege which a witness may waive. If he waive the privilege, he must submit to a full cross-examination. *Chamberlain v. Willson*, 356.
 3. STATEMENT BY A WITNESS, UNDER OATH, THAT HE CAN NOT TESTIFY without incriminating himself, is sufficient proof of the same, unless the court is satisfied that the witness is mistaken, or acts in bad faith. *Id.*
 4. WITNESS NEED NOT ANSWER A QUESTION, when by so doing he will be exposed to a prosecution for a crime, or a penalty. *Id.*
 5. PRIOR STATEMENTS OF A WITNESS OUT OF COURT, ARE INADMISSIBLE to corroborate his testimony. *Munson v. Hastings*, 345.
 6. QUESTIONS MAY BE ASKED UPON CROSS-EXAMINATION to test the accuracy or veracity of a witness. *Stevens v. Beach*, 359.
 7. WITNESS CAN NOT BE IMPEACHED BY SHOWING THE FALSTY of his testimony concerning facts collateral to the issue. *Id.*
 8. WITNESS CAN NOT BE IMPEACHED by proving that he made different statements to other persons, until after he has been asked whether or not, at a time and place named, he made such contradictory statements to them. *State v. Marler*, 398.
 9. IMPEACHMENT OF WITNESS.—PARTICULAR ACTS OF IMMORALITY or crime can not be testified to for the purpose of impeaching a witness; general character for truth can only be inquired into. *Phillips v. Kingfield*, 760.
 10. GENERAL CHARACTER FOR TRUTH MAY BE PROVED as a fact, and the jury are then to form their own opinion respecting the witness' credibility. *Id.*
 11. FORM OF INTERROGATORY IN SUCH CASE, may be whether the person testifying knows the general character of the witness, and if so, what is his general reputation for truth. *Id.*
 12. CROSS-EXAMINATION IN SUCH CASE may extend to the opportunity for knowing the witness' character, for how long and how generally unfavorable reports prevailed, and from whom they were heard. *Id.*
 13. TO IMPEACH A WITNESS it is not allowable to ask another if he would believe the witness under oath. *Id.*
- See CORPORATIONS, 23, 24; EVIDENCE, 3; FRAUDULENT CONVEYANCES, 6; PARTITION; PLEADING AND PRACTICE, 13, 17.



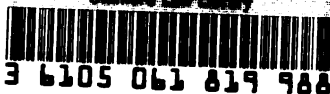








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